

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period
October 1, 1943
Through December 31, 1943
Volume XXXIII

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from October 1, 1943, through December 31, 1943.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,

WILLIAM N. McQUEEN,
Acting Attorney General.

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OPINIONS

October 1, 1943.

Hon. Joe N. Poole, Commissioner,

Agriculture & Industries Department,

Capitol.

Use of non-warranty in connection with labeling or advertising seed—

To use a non-warranty or disclaimer clause in connection with labeling or advertising seed and a failure to properly label seed showing noxious weed seed is a violation of the Alabama Seed Law—

To use a non-warranty or disclaimer clause in connection with labeling or advertising seed which is in contradiction to any information required under Section 2, of the new Alabama Seed Law is a violation of the Alabama Seed Law.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

Your request for an official opinion dated September 16, 1943, is as follows:

"Section 3, Paragraph (m)-(5) of the new Alabama Seed Law, also known as House Bill No. 560 and Senate Bill No. S. 369—Henderson and Garrett, reads as follows:

"It shall be unlawful for any person within this State *** To use a non-warranty or disclaimer clause in connection with labeling or advertising seed which is in contradiction to any information required, under this Act."

"Section 2 of this same Act requires that seedsmen offering, selling or distributing seed in Alabama, label the seed to show certain information, including the percentages of pure seed, weed seed, other agricultural seed, insert material, germination, rate of occurrence of noxious weed seed, and the correct name of kind and variety as well as some other information. At the present time many seedsmen are using a non-warranty clause which reads as follows:

"We give no warranty, express or implied, as to description, quality, productiveness, or any other matter of any seeds we send out, and we will not be in any way responsible for the crop."

"I shall appreciate it if you will advise me whether or not this non-warranty clause is in contradiction to the above named section of the Alabama Seed Law. For your information I might add that farmers

sometimes find difficulty in obtaining adjustments on seed bought from seedsmen because of the non-warranty clause used by the vendor or shipper. Several states prohibit the use of these non-warranty clauses entirely."

Prohibitions pertaining to labeling requirements, subsection 5 of Section 3 of the new Alabama Seed Law, further provides: "To use a non-warranty or disclaimer clause in connection with labeling or advertising seed which is in contradiction to any information required under this Act," is a violation of the Alabama Seed Law, and any person violating it is subject to criminal prosecution and upon conviction thereof shall for the first offense be fined not less than ten dollars nor more than one hundred dollars and for a second conviction said Act shall be punished by a fine not exceeding two hundred and fifty dollars.

The above Act expressly prohibits the giving of non-warranty in contradiction to any information required by said Act, either expressed or implied, as to description, quality, productiveness, or any other matter of any seed sent out for agricultural purposes.

One of the main purposes of this Act is to have all seeds properly labeled and it expressly prohibits any person from using non-warranties on any seed sent out for agricultural purposes. To permit any class of persons who might be dealers or shippers of seed used in agriculture to stamp or label or otherwise mark or print on containers "We give no warranty, express or implied, as to description, quality, productiveness, or any other matter of any seeds we send out, and we will not be in any way responsible for the crop," would, and does destroy the effectiveness of the labeling and opens the way for fraud to be perpetrated upon the public.

I am of the opinion and so hold that the non-warranty clause as used by some seedsmen set out in your request is in conflict with Section 2 of the Alabama Seed Law.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 5, 1943.

Hon. D. Hardy Riddle,

Judge of Probate,

Talladega County,

Talladega, Alabama.

Act No. 575, H. 421, approved July 7, 1943—Code 1940, Tit. 15, § 432—Code 1940, Tit. 45, § 211—Insane Persons—Sheriff's mileage—Sheriff's Fees for Taking into Custody—Insane Prisoners—Feeding—Code 1940, Tit. 45, §§ 144, 145—

1. "Mileage" payable to Sheriff for taking insane persons to Alabama State hospital should be calculated from point where journey begins, whether at jail or elsewhere, to hospital and return.

2. Such mileage is in lieu of all compensation allowed to Sheriff for such services and covers all expense incurred by him in making the journey including meals and lodging in course of journey and other ordinary expense incident thereto.

3. Such mileage applies only in cases where Sheriff is deputed or ordered by judge of probate under Code 1940, Tit. 45, § 211 to take insane person to such hospital, or in cases where under Code 1940, Tit. 14, § 432 Sheriff arrests an unrestrained insane person and by order of the judge of probate takes him to State hospital, and is payable only for journeys to a State hospital for the insane.

4. Sheriff not entitled to additional mileage for bringing persons from hospital on return journey from hospital.

5. Fee of \$5.00 payable to Sheriff in all cases where he takes insane person into custody as ordered by judge of probate under Code 1940, Tit. 15, § 432, or under Tit. 45, § 211, and is not payable where Sheriff has custody prior to proceedings to inquire into sanity of a prisoner.

6. The allowance to Sheriff for feeding prisoners and for preparing and serving food pursuant to Code 1940, Tit. 45, §§ 144, 145 is based on the total number of prisoners fed, including insane prisoners. Insane prisoners are on a parity with other prisoners within the purview of Tit. 45, §§ 144, 145.

7. The county governing body is not authorized to make allowances, or contract with the Sheriff for feeding insane patient prisoners otherwise than as required by Code 1940, Tit. 45, §§ 144, 145.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of August 6, 1943, is as follows:

"There was recently passed by the Legislature a law, House Bill No. 421, approved July 7th, 1943, which provided for certain fees for Sheriffs in relation to insane persons. For the guidance of this office I would like to have your opinion on the following questions raised by this law:

"1. In Section 1 of the above law there is the following: 'and 10 cents per mile in removing any such person to a State Hospital for the insane;'

"I would like to know if this means both going to the hospital with the patient and returning. That is for round trip mileage?

"Would the fees, mileage, etc., provided by this law apply where the Sheriff takes a patient to the Veteran's Hospital instead of the State Hospital.

"Would the Sheriff or his deputy be entitled to board and lodging, where it was necessary to make over-night stops or otherwise, in addition to the fees provided by this law?

"2. Section 1 also states 'shall also receive the same fees for feeding insane prisoners as are allowed by the State for the feeding of other State Prisoners.'

"Does this mean the actual cost of the food per day as shown by the Sheriff's feed bill for the month in which the patient was in the County Jail, as provided by Title 45, Section 144?

"Would the Sheriff also be entitled to the fees for preparing and serving the food as provided by Title 45, Section 145?

"In the second case would the fee be based on the total prisoners in the jail or the total insane prisoners?

"Under this law would it be within the power of the Court of County Commissioners to agree with the Sheriff on an average figure to pay for the board of insane patient prisoners, which would approximate the average paid for feeding state prisoners to be used all the time to facilitate the handling of these bills?"

In addition to the foregoing other requests have been made for my official opinion as to the operation and effect of this recent act of the Legislature (Act No. 575, H. 421, approved July 7, 1943) which reads as follows:

"Section 1. The Sheriffs of the several counties of the State of Alabama shall receive for arresting and taking into custody any person charged with being of unsound mind the following fees and mileage: \$5.00 for taking any such person into custody, and 10 cents per mile in

removing any such person to a State Hospital for the insane; and such Sheriffs shall also receive the same fees for feeding insane prisoners as are allowed by the State for the feeding of other State prisoners.

"Section 2. The fees and mileage provided for in Section one hereof shall be paid from the general fund of the several counties and shall be paid in the same manner and way as other claims against said fund are paid."

In my opinion the Act does not amend or repeal any provision of existing law in the Code of 1940, relating to insane persons or insane prisoners.

It will be noted that whatever claims may arise under the act, except "for feeding insane prisoners," are payable out of the county's general fund "in the same manner and way as other claims against said fund are paid."

Clearly the act is without application to insane prisoners such as are dealt with under Code 1940, Tit. 15, §§ 426-430, for whom "the cost of removing *** to and from the Alabama State hospitals *** must be defrayed by the State as in case of removal of prisoners from one county to another *** ." Code 1940, Tit. 15, § 431.

This leaves for consideration the application of the act to other provisions of law in the Code of 1940 relating to insane persons, viz. Tit. 15, §§ 432, 433, and Tit. 45, §§ 205-213.

The act does not refer to or purport to amend or repeal other provisions of law and should not be construed as having that effect in the absence of clear legislative intent or in the absence of irreconcilable conflict with other provisions of law. It should be so construed as to harmonize with other provisions of law relating to the same subject matter, if that be possible upon consideration of them all in *pari materia*. **Roberts v. Hunt**, 212 Ala. 475, 476, 103 So. 451; **Sutherland on Statutory Construction**, §§ 283, 288.

Applying this rule of construction, I am of opinion that the act in question was intended definitely to fix and limit the compensation of Sheriffs or their deputies when acting in their behalf (1) for arresting and taking into custody unrestrained insane persons pursuant to procedure authorized by Code 1940, Tit. 15, § 432, and (2) for taking or "conveying" them to an Alabama State hospital, when so "deputed" or ordered by the judge of probate, before whom they are arraigned, as provided by said Section 432, and by Tit. 45, § 211.

Compensation is definitely fixed and limited by the act under the designation of "mileage" at "10 cents per mile" for such services in taking, "conveying" or "removing," and includes, in my opinion, all expense incurred by the Sheriff or his deputy in the course of the journey, whether by motor vehicle, railway or otherwise, and the expense of meals in transit. I am driven to this conclusion by the well established rule of law that public officers are entitled to only such compensation for their official services as is expressly provided by statute. **Ex parte Mobile Co.**, 200 Ala. 410, 76 So. 2; **Torbert v. Hale Co.**, 131 Ala. 143; 46 C. J. 1019, § 250, Note 94 and cases; **Mobile County v. Williams, Judge**, 180 Ala. 639, 61 So. 963.

This is especially true inasmuch as for transportation of indigent insane persons, under § 211, Tit. 45, supra, the expense is paid out of public funds and made a claim against the county. This is not to say, however, that the Sheriff would not be entitled to reimbursement for some extraordinary or unusual expense incurred by him in the course of the journey to the hospital, such as could not be reasonably anticipated or was not incidental to traveling. Doubtless, if during the course of the journey it became necessary for the Sheriff to engage the services of a physician for the protection of the patient, that expense should be paid, in addition to "mileage" as a part of "expenses incurred in conveying" the patient.

Likewise, in my opinion, "mileage" should be calculated upon the number of miles travelled by the Sheriff from the beginning of the journey to its end, both going and returning, or "for the round trip," whether the point of beginning be the county jail, or some other point, wherever the Sheriff takes the patient in charge for the purpose of making the journey to the hospital.

The act is not broad enough to include additional "mileage" for the Sheriff in case he should, on the return journey, bring back from the hospital another insane patient. The "mileage" authorized by the act is, for "removing" such persons "to the hospital."

With reference to allowance "for feeding insane prisoners," it would seem clear from the language of the act itself that such prisoners are to be considered on a parity with State prisoners and counted as such for purposes of "feeding." Code 1940, Tit. 45, §§ 144, 145.

In my opinion the fee of \$5.00 fixed by the Act for taking insane persons into custody is properly charged in cases where the Sheriff makes an arrest of an "insane person who is at large and not under the control, restraint or management of any person," as authorized by Title 15, Section 432, and in cases also where upon application to the judge of probate under Title 45, Section 208, it becomes necessary for the Sheriff to arrest and take such persons into custody, and in all cases where the insane person is taken into custody by the Sheriff or where custody is delivered to the Sheriff. Such fee is properly included in the claim of the Sheriff when presented for payment as a claim against the county, payable out of the general fund, for conveying indigent insane persons to a State hospital.

If the Sheriff already has custody of the insane person as a prisoner held on some criminal charge prior to proceedings to inquire into his sanity, there is no change of custody and the \$5.00 fee prescribed by the Act would not be chargeable by the Sheriff. Under Tit. 45, § 211, it is a matter within the discretion of the judge of probate whether or not he shall "depute" or appoint the Sheriff in his official capacity, to convey the patient to the hospital. He may, if he sees fit, appoint some other person or persons for the purpose.

Inasmuch as under said Section 211, the judge of probate may "depute one or more persons," if he should in addition to the Sheriff depute some other person as a guard or nurse necessary in the course of transportation, that additional expense would, in the case of indigents, be properly included as an expense payable by the county. The Sheriff himself, however, by reason of the Act under review, construed in its relation to Section 211, is not

authorized to employ such a guard or nurse, unless possibly it became necessary to do so, upon a sudden emergency in the course of his journey, after the Probate Judge had made his order.

By the foregoing I have endeavored to answer all inquiries so far received in relation to this Act, but it is possible that some have escaped me, and in that event I shall endeavor to answer them upon request.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 5, 1943.

Hon. Bradley G. Brown,

License Inspector,

Jefferson County,

Birmingham, Alabama.

Code 1940, Tit. 51, § 833—Code 1940, Tit. 51, §§ 704, 877—Licenses—False Affidavit or Certificate—

Applicant for license for motor vehicle knowingly making a false affidavit or certificate required to be made in order to obtain the license is subject to prosecution under Code 1940, Tit. 51, § 833.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of March 20, 1943, is as follows:

"I am setting out below two violations, regarding the issuance of motor vehicle tags, that have been brought to the attention of this office. As these violations seem to be many, I would appreciate your advice as to my jurisdiction or authority in straightening these out:

"1. Some residents of the City of Birmingham, in making application for motor vehicle tags, have given their address as 'outside the corporate limits,' presumably, to save city taxes.

"2. Several truck owners, in making application for their tags, to the

License Commissioner, have misrepresented the year model, presumably to save taxes, i. e., they would assess a 1940 truck as a 1936, but would use the correct motor number.

"In this instance, would this be an improper tag, inasmuch as the described vehicle on the assessment is not the correct year model, even though the motor number is the same?

"If it is not the duty of this office to handle the above violations, whose duty is it?"

In connection with the procurement of licenses for the operation of motor vehicles under the circumstances above stated, the licensees have apparently practiced deceit or have made false statements as to matters of fact, and have defrauded the State and the City of Birmingham of revenue which they would otherwise have received had they made true statements upon their applications for licenses.

If such statements were known to be false at the time they were made by the applicants for license or licensees, and were made in the form of an affidavit or certificate for the purpose of obtaining a license there would appear to be no good reason why they should not be made basis for prosecution under Code 1940, Tit. 51, § 833, which reads as follows:

"§ 833. False affidavits.—Any person who shall knowingly make any false affidavit or certificate in connection with the ordering or procuring of a license to carry on any business or do anything in this state for which a license is required, shall be guilty of a misdemeanor and upon conviction, when the offense is not otherwise specifically provided for, shall be fined not less than one hundred dollars, nor more than one thousand dollars, and at the discretion of the court, may be sentenced to hard labor for the county not to exceed six months as additional punishment."

I find no provision of law authorizing the revocation of a license for the operation of a motor vehicle, where the license was issued upon some false statement. Nor do I find any provision of law whereby the making of such false statement would be basis for a prosecution for perjury, inasmuch as so far as I can ascertain the statute does not require the making of any affidavit in connection with the issue of licenses, under Code 1940, Tit. 51, § 877, for motor vehicles upon assessment of ad valorem taxes thereon before the License Commissioner of Jefferson County.

That statute in my opinion, is too vague and indefinite in its provisions as to return and assessment of motor vehicles to authorize by implication the requirement that the return or assessment should be made under oath. Such return and assessment, the statute expressly provides are separate and apart from the return and assessment of other property for taxation, and provisions of law applicable to return and assessment of other property cannot by intentment be imported into the statute so as to create a penal offense.

Nor could a prosecution be maintained in my opinion, based on the facts stated, for false pretenses under Code 1940, Tit. 14, § 209 or kindred statutes involving fraud, for the simple reason that a license is a permit merely or

privilege, and in no sense property or a property right. *Jones v. Mobley*, 78 Ala. 370; 37 C. J. 168, § 4.

If, therefore, the applicant for license or licensee has in connection with obtaining a license knowingly made a false affidavit or false certificate which he was required to make in order to obtain the license he is subject to prosecution for a misdemeanor under Code 1940, Tit. 51, § 833. Such prosecution could be initiated by you by affidavit before a magistrate, or the matter could be brought to the attention of the Circuit Solicitor for such action as he might see fit to take by presenting it to the Grand Jury.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 6, 1943.

Hon. Holt A. McDowell, Sheriff,

Court House,

Jefferson County,

Birmingham, Alabama.

Sheriffs—License to carry pistol—Title 14, Section 177, Code of Alabama 1940—

When a license to carry a pistol issued under the provisions of Title 14, Section 177, Code of Alabama expires, an application must be filed before another license can be issued. It is not necessary to file a copy of the application with the Secretary of State at any time.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of September 28, 1943, is as follows:

"Paragraph 177, Title 14, of the Code of Alabama, 1940 sets out the procedure under which a sheriff may issue a license to carry a pistol.

"Form 20, being a Pistol License Application, a copy of which is enclosed, states that the original shall be retained by the issuing office, and the copy mailed to the Secretary of State. This form requires an affidavit sworn to before a Notary Public.

"Will you kindly give me your opinion on the following question?

"1. Suppose a person files an application for a license to carry a pistol and it is issued. Upon the expiration of his license he asks that it be renewed. Is it mandatory that another application be obtained before the license is renewed, and a copy of same mailed to the Secretary of State?

"2. The Code Section above referred to states that a copy of the license shall be mailed to the Secretary of State, but does not mention a copy of the application. Is it mandatory that a copy of the application be sent to the Secretary of State at all?

"3. If it is mandatory that a copy of the first application be mailed to the Secretary of State, is it also mandatory that a copy on renewal be sent to him?"

The authority of the sheriff to issue a license to a person to carry a pistol, and the procedure for the issuing of such license is set out in Title 14, Section 177, Code of Alabama 1940, which Section is as follows:

"§ 177. Issue of licenses to carry.—The sheriff of a county, may upon the application of any person residing in that county issue a license to such person to carry a pistol in a vehicle or concealed on or about his person within this state for not more than one year from date of issue, if it appears that the applicant has good reason to fear an injury to his person or property, or has any other proper reason for carrying a pistol, and that he is a suitable person to be so licensed. The license shall be in triplicate, in form to be prescribed by the secretary of state, and shall bear the name, address, description, and signature of the licensee and the reason given for desiring a license. The original thereof shall be delivered to the licensee, the duplicate shall within seven days be sent by registered mail to the secretary of state and the triplicate shall be preserved for six years, by the authority issuing said license. The fee for issuing such license shall be fifty cents which fee shall be paid into the county treasury."

Your first inquiry presents two questions, (1) Upon the expiration of a license to carry a pistol issued pursuant to the provisions of Section 177, supra, is it mandatory that another application be filed before the license can be renewed, or more correctly stated, before another license can be issued, and (2) Is it mandatory that a copy of such application be mailed to the Secretary of State?

In answer to the first question presented by your inquiry I wish to advise you that it is mandatory that another application be filed before another license can be issued. The purpose of the application is to obtain necessary information about the applicant in order that the sheriff may determine whether or not a license should be issued to the applicant. Under Section 177, supra, the license can be issued only for the period of one year. When this period expires and the licensee wishes to obtain another license, events might have taken place during such period that would so alter the situation and facts contained in the first application as to not warrant the issuance of a license to the applicant. It follows that in order that the sheriff may have

before him the correct information in regard to the applicant at the time of the application that an application must be filed before each license is issued.

In answer to the question presented by your inquiry it is my opinion that it is not mandatory for you to file a copy of the application with the Secretary of State at any time. Section 177, supra, provides that the license shall be in triplicate, the original of which shall be delivered to the licensee, the duplicate sent to the Secretary of State by registered mail, and the triplicate preserved for six years. There is nothing in said Section 177 that requires that a copy of the application be mailed to the Secretary of State.

In view of the answer to the second question presented by your first inquiry it is not necessary to answer your second and third inquiries. I might add however that it is necessary for you to send the duplicate of each license issued to the Secretary of State by registered mail.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 7, 1943.

Hon. W. A. McKay,

Judge of the Civil and Criminal Court,

Autauga County,

Prattville, Alabama.

OFFICES—

TWO OFFICES OF PROFIT UNDER CONSTITUTION 1901, SECTION 280—

The clerks of the jury commissions of the various counties of this State are not holding an office of profit within the meaning of the Constitution of 1901, Section 280.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of September 25, 1943 is as follows:

"Having been conditionally offered the Secretaryship to the Autauga County Board of Jury Commissioners, I would thank you to advise by early mail whether or not it would be a violation of the Constitution to officiate in my present capacity, Judge of the Civil & Criminal Court of Autauga County, an elective office, and at the same time serve the Jury Commissioners in that, an appointive post. The Board's first session will be held Monday, Oct. 3."

The constitutional provision, to which you refer in your letter, is Section 280 of the Constitution of 1901, wherein it is provided that no person shall hold two offices of profit in this State at one and the same time with named exceptions not here important. Title 30, Sections 8-29 of the Code creates jury commissions for the counties of this State and prescribes their powers and duties. Among other things they are authorized to employ a clerk for the commission and may at any time discharge him without cause and employ another clerk.

Confessedly such clerk is not an officer within the meaning of Section 280 of the Constitution. *State ex rel Glenn v. Wilkinson*, 220 Ala. 172. It follows that you may accept employment as Clerk of the Jury Commission of Autauga County without in any degree affecting your office or rights thereto as Judge of the Civil and Criminal Court of Autauga County.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 7, 1943.

Hon. Roy Johnson,

Tax Assessor,

Jefferson County,

Birmingham, Alabama.

Defense Plant Corporation—Property of, located in City of Birmingham, Alabama not exempt from ad valorem taxation.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for official opinion bearing date of September 25, 1943 is as follows:

"Jefferson County has a good many problems of taxation, one of which is the fact that the United States Government is building plants, purchasing machinery and equipment and installing it in various factories for the manufacture of war materials. There are several instances of this, one is Ingalls Iron Works Company, which has what is known as a 'pickling plant', and all the machinery and equipment is financed and built by the Defense Plant Corporation. The Government further has installed certain machinery at the Rheems Manufacturing Company, which is claiming tax exemption. Betchel-McCone-Parsons out at the airport is another instance of this.

"From the attached letter of Comptroller Armstrong and the long legal opinion by Attorney Willis they would be subject to ad valorem tax. In this connection the Constitution exempts all the property, real or personal, owned by the United States Government, and I would, therefore, be glad to have you render an official opinion as to whether or not buildings and machinery erected by Defense Plant Corporation or placed on private property by the Defense Plant Corporation or any branch of the Government is subject to ad valorem tax."

In my opinion your inquiry must be answered in the affirmative.

Title 51, Section 2, Code of Alabama 1940 exempts from ad valorem taxation " *** all property, real and personal, of the United States and this State, *** ."

Title 51, Section 22, Code of Alabama 1940 provides:

"§ 22. Property and activities of United States and its agencies.—Property and activities of the United States and its agencies shall be taxable as other property and activities, except where the State of Alabama is without constitutional authority to impose such taxes."

The latter statute is the most recent expression of the will of the Legislature of Alabama.

Title 15, U.S.C.A., Section 610 provides:

" *** except that any real property of the corporation shall be subject to state, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The exemption provided for in the preceding sentence with respect to taxation *** shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation but also with respect to (1) The Defense Plant Corporation *** ."

It is a well known rule of statutory construction that exemptions from taxation are strictly construed. Although Title 51, Section 2 of the Code of Alabama 1940, exempts all property of the United States and this State, section 22 on the contrary, being a later expression of the Legislature limits the meaning of the exemption in section 2 and provides that property of the United States and its agencies shall be taxable except where the State is without constitutional authority to impose the tax. If the property owned

by the Defense Plant Corporation was ever exempt from State taxation because of its immunity as a federal instrumentality, such immunity has been waived by the Act of Congress cited above. (Title 15, U.S.C.A., Section 610.)

"The Congress has the power to waive the immunity from state taxation which would otherwise attach to federal instrumentalities and transactions." **King & Boozer v. The State**, 241 Ala. 557, 3 So. 2d 572.

But for the immunity from State taxation as a federal instrumentality there is no other reason why the property of the Defense Plant Corporation should not be taxed by the State of Alabama. Since this immunity has been waived, it is my opinion that the State of Alabama is not prohibited by the Constitution or statutes, State or Federal, from imposing ad valorem tax on the real property of this corporation.

This opinion applies only to real property owned by the Defense Plant Corporation. You ask also whether property of "any branch of the Government" is taxable. We are unable to advise whether property of any branch of the Government is exempt unless the particular branch is specified.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 7, 1943.

Hon. Frank N. Julian,

Superintendent of Insurance,

Department of Commerce,

Capitol.

Taxation—Title 51, Section 825, Code of 1940—Levying reciprocal tax on foreign insurance companies doing business in Alabama held unconstitutional.

Insurance—Title 51, Section 825, Code of 1940—Levying reciprocal tax on foreign insurance companies doing business in Alabama held unconstitutional.

Foreign Corporations—Title 51, Section 825, Code of 1940—Levying reciprocal tax on foreign insurance companies doing business in Alabama held unconstitutional.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for official opinion bearing date of September 28, 1943, is as follows:

"Re: Reciprocal Taxes, Penalties, etc.

"By reference to Section 825, Title 51, Code of Alabama, you will note that the said Section requires the application of reciprocal tax statutes on insurance companies.

"This Section was enacted in 1935 and the Attorney General's office advised this office orally that the Section was not enforceable, and later in 1939 the Attorney General's Department likewise, in an oral opinion, advised this office that the Section was not enforceable.

"In view of the fact that other states are now enforcing similar provisions against Alabama insurance companies licensed in such other states, we respectfully ask your opinion as to whether or not the said Section 825 is valid and enforceable.

"If your opinion is in the affirmative, also advise whether or not this office should proceed to apply the provisions of the said Section for the years that the said Section has been in force to date."

In my opinion your question must be answered in the negative.

Title 51, Section 825, Code of Alabama 1940, provides as follows:

"§ 825. Reciprocal taxes, penalties, etc.—If by the laws of any other state any taxes, fines, penalties, licenses, fees or other obligations or prohibitions additional to or in excess of those imposed by the laws of this state upon insurance companies of other states and their agents are imposed on insurance companies of this state and their agents doing business in such state, like taxes, fines, penalties, licenses, fees or other obligations and prohibitions shall be imposed upon all similar insurance companies of such state doing business in this state so long as such laws remain in force."

Section 8363, Code of Alabama 1923, provided as follows:

"8363. Deposits, charges, and payments required by other states of insurance companies of this state, also required of insurance companies of such states.—Whenever the existing or future laws of any other state of the United States shall require of the insurance companies incorporated by, or organized under, the laws of this state, or the agents thereof, any deposit of securities in such state for the protection of policy holders, or otherwise, greater than the amount required for similar purposes from similar companies of other states by the then existing laws of this state, then, in every such case, all companies of such states establishing or having heretofore established an agency or agencies in this state, shall make the same deposit for a like purpose with the treasurer of the state,

and shall pay into the treasury of this state the taxes, fines, penalties, license fees, or otherwise, an amount equal to the amount of such charges and payments imposed by the law of such state upon companies of this state and the agents thereof."

The statutes quoted above are commonly known as retaliatory or reciprocal laws. In 1931 the Supreme Court of Alabama in the case of **State vs. Firemen's Fund Insurance Company**, 223 Ala. 134, 134 So. 858, held that the statute in the 1923 Code, supra, was unconstitutional in that such statute was a delegation of legislative power and also that the statute denied equal protection of the law. Title 51, Section 825 of the Code of Alabama 1940 is similar, if not identical, to the statute in the 1923 Code.

The statutes providing for reciprocal taxes on insurance companies of other states have been uniformly upheld. So far as my search shows, Alabama is the only State in the Union that has held such statute unconstitutional. (See 91 A. L. R. 795; 77 A. L. R. 1490; 79 Law. Ed. 506; 11 Am. Juris. 931; 3 Utah Code Annotated 43-3-8; Cahills Consolidated Laws of N. Y., 1940 Supplement, Article 4, Section 61.)

As late as 1940, the Alabama Supreme Court has cited the case of **State vs. Fireman's Fund Insurance Company**, 223 Ala. 134, 134, So. 858, and that decision has not been overruled. **Phenix City v. Alabama Power Co.**, 239 Ala. 547, 195 So. 894.

You, are, therefore, advised that Title 51, Section 825 of the Code of Alabama 1940 is unconstitutional and, therefore, unenforceable.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 7, 1943.

Hon. W. C. Harrison,

Associate Commissioner,

Alabama Public Service Commission,

Capitol.

Public Service Commission—Appeals—Title 48, Section 73, Code of 1940—Title 48, Section 301(27), Code of 1940.—

The thirty-day statutory period during which an appeal may be taken from a final order of the Public Service Commission begins to

run on the date of issuance of such final order rather than the effective date thereof.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for official opinion bearing date of September 25, 1943, is as follows:

"Section 27 of Alabama Motor Carrier Act of 1939 provides as follows:

"Section 27. From any final action or order of the Commission in the exercise of the jurisdiction, power, authority, conferred upon the Commission by this Act, an appeal shall lie to the Circuit Court of the County of the carrier's residence, or in which he has his principal place of business or to the Circuit Court of Montgomery County, Alabama, sitting in equity, and thence to the Supreme Court of Alabama. Such appeals must be taken within thirty days after the date of such final action or order and such appeals and the supersedeas and stay of action or order appealed from in other respects shall be governed by the provisions of the law now in force, or hereafter enacted, respecting appeals in other cases from the final order and actions of the Commission."

"This Commission issued an order on a specified date, which order provided that the order would become effective on a later date. Would an appeal under Section 27 have to be filed within thirty days from the date the order was issued, or could it be filed within thirty days from the effective date of the order?"

In answer to your inquiry, it is my opinion that the appeal provided for in Title 48, Section 301(27), Code of 1940, supra, must be taken within thirty days after the date of the final order rendered by the Public Service Commission, rather than within thirty days from the effective date of such order.

It is by virtue of Title 48, Section 73, Code of 1940 that every order of the Public Service Commission shall be effective twenty days after the service thereof, or such other time as may be prescribed by the Commission. Manifestly, this statute is not concerned with the time in which an appeal from a final order of the Commission may be taken to the Circuit Court, nor is the effective date of such order, either expressly or impliedly, a basis upon which the thirty-day period for taking an appeal may be computed.

It appears in the language of Title 48, Section 301(27), Code of 1940, supra, that the Legislature intended an appeal from a final order of the Public Service Commission to be "taken within thirty days after the date of such final action or order." There is no indication that a variation between the date of the final order and the date it is to become effective alters or modifies this unequivocal provision.

In the case of **Alabama Public Service Commission vs. Alabama Power Company**, 213 Ala. 374, 104 So. 814, although the effective date of the order

was the same date as its issuance, the Supreme Court of Alabama expressly stated that the thirty day period during which an appeal therefrom could be taken must be computed from the date of the issuance of final order of the Public Service Commission.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 7, 1943.

Hon. O. L. Andrews,

Circuit Clerk,

Jefferson County,

Birmingham, Alabama.

APPEALS FROM COURTS OF RECORD IN JEFFERSON
COUNTY—SUBSTITUTION OF THE TRANSCRIBED EVIDENCE
FOR BILLS OF EXCEPTION—

1. H. B. No. 76 of the Legislature of 1943 abolishing bills of exception and substituting transcribed evidence and procedure by the court reporter applies only to the original divisions of courts of record of Jefferson County.

2. If notice of appeal is given in the manner prescribed in Title 15, Section 368, of the Code and bill of exceptions prepared and signed by a judge prior to September 1, 1943, the Act as to substituting certified transcribed evidence for bill of exceptions does not apply, but if no bill of exceptions is signed prior to that date then the Act as to transcribed evidence in lieu of bill of exceptions is effective and controlling.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of August 17, 1943, is as follows:

"RE: House Bill No. 76 (Fite) Abolishing Bills of Exceptions:

"Please give me your official opinion as to the above act.

"FIRST: What is the intent of the act, or rather what was the purpose of making a change from the old procedure?

"SECOND: Does it affect Jefferson County, where we have a full time Court Reporter in the Criminal Divisions, but none in the Civil or Law or Equity Divisions?

"THIRD: Should any Court Reporter file a Transcript of Evidence in our Court, shall we proceed to copy it into the transcript to the Appellate Court as we formerly did the Bill of Exceptions?

"FOURTH: The act becomes effective September 1, 1943. How would this affect cases tried before that date, even though the bond or the Transcript of Evidence were filed before or after that date?

"Attorneys and Court Reporters here are very much in disagreement as to just what procedure to follow in regard to this act. Your official opinion will be greatly appreciated."

The act of the legislature on which you base your request for an opinion abolishes bills of exception and substitutes therefor the transcribed testimony properly authenticated by the court reporter in the circuit courts, courts of like jurisdiction and all other courts of record having a full time court reporter.

All the circuit courts of this State have a full time court reporter except the circuits composed of one county having three or more judges (Jefferson and Mobile Counties), Title 13, Sections 261 et sequi. The Circuit Judges of the criminal division in the Tenth Judicial Circuit (Jefferson) have a full time court reporter. General Acts 1923, pages 605-607.

Assuming that you are correct in saying that there are no courts in Jefferson County except the criminal divisions that have full time court reporters the Act under review has no application to the courts of Jefferson County, except the criminal divisions. The Act by its very terms applies to these criminal divisions. In these divisions the requirement for bills of exception is abolished—repealed. It, therefore, becomes the duty of the reporters in these divisions, on appeal to comply with this Act. After notice as therein prescribed, he shall transcribe the evidence, objections, oral motions, and rulings of the court thereon, certify it and file the same with the clerk of the court. When this is done it becomes a part of the record on appeal.

A proper consideration of your fourth question is enmeshed in many complicated difficulties. It becomes necessary to consider certain principles of statutory construction and to cite authorities thereon, and also to note many provisions of law embodied in our Code of 1940, dealing with the subject of appeals, bills of exceptions, etc. It is wholly impracticable to discuss in detail these codal provisions. We will simply note them as a basis for a consideration of the Act under review.

It is a familiar rule of statutory construction that legislative enactments relating to remedies and procedure are to be construed liberally with a view

to the effective administration of justice and of reducing the labor and expense of litigants. However, such statutes may not be so construed as to mean something entirely different from its clear intention. 59 C. J. 1129, Section 669.

With this rule of construction in mind our Supreme Court has held that a statute dealing with procedure applies to all actions including those pending at the time of the passage of the law. *Smith v. Colpock*, 235 Ala. 513.

The Act here under construction is remedial and procedural. The mere fact that a case was tried prior to the effective date of the statute will not prevent the operation of the Act upon such case on appeal. However, the language of the Act when considered with existing law dealing with that or similar subjects may lead to the conclusion that it was not the purpose of the law to apply to steps taken prior to its effective date. It must be conceded that the Act did not go into effect until September 1, 1943, and that existing law on that subject remained in force until that date unless the language of the Act clearly shows a definite intention to the contrary. Title 15, Section 365 of the Code provides that any question on trial in criminal cases may be reserved for the consideration of the Supreme Court or Court of Appeals and if the question does not distinctly appear on the record it must be presented by a bill of exceptions. Title 15, Section 368 of the Code prescribes the manner of taking an appeal and giving notice thereof. Section 371 of this Title makes the same provisions as to bills of exceptions in civil cases applicable to criminal cases.

Section 379 of the Code requires the clerk of the court, either when the judgment of conviction is suspended or when an appeal is taken without such suspension to make out a full transcript of the record: (That is to say, all matters appearing on his records in that case.) attach his certificate to it and transmit the same to the clerk of the appellate court within twenty days after the date of the judgment or if there is filed a bill of exceptions in the meantime he must so certify within twenty days after the bill of exceptions is signed. If no bill of exceptions is filed within the time allowed by law therefor he must certify and forward the record of the case to the higher court. This section by its language connects itself with the provisions of Title 7, Sections 817-827 of the Code dealing with bills of exceptions. Section 822 of this series of sections requires that the bill of exceptions be filed in the clerk's office within ninety days from the date of the judgment of conviction. These provisions as to bills of exceptions apply in criminal cases. **Code**, Title 15, Section 371. Appeals in criminal cases must be taken either at the time of the judgment of sentence or by filing a written statement with the clerk that the defendant appeals from the judgment. This statement may be filed any time within six months from the date of judgment. **Code**, Title 15, Section 368. In arriving at the intent and legal effect of this Act under review, it is necessary to consider it in connection with the above sections of the Code we have cited.

The Act expressly fixes a future date—September 1, 1943,—on which it becomes effective. The fact that the Legislature postponed its effective date, after its passage, evinces a legislative intent not to make its provisions retrospective as to existing rights and remedies. *Watkins v. Reinhart*, 243 Ala. 243, 9 So. (2d) 113.

It is familiar law that a statute has no force until it becomes a law of the land on the date fixed for it to go into effect. *Lee v. City of Decatur*, 233 Ala. 411, 172 So. 284.

There is nothing in the Act that amends or repeals existing provisions of the Code of 1940 governing the right or time of taking an appeal, nor does it repeal Section 368, of Title 15, of the Code prescribing the manner of taking an appeal. This section, in effect, prescribes the manner of giving necessary notice of appeal. This notice must not be confused with the provisions of the Act providing that a party desiring to appeal shall give notice to the court reporter of his desire and request for the evidence to be transcribed. The manner of taking an appeal as provided in Section 368, of Title 15, *supra*, is still the law and must be followed. The law requires the clerk of the court to certify to the Supreme Court or Court of Appeals the record on failure to comply with the procedure of completing appeals. The provisions of the Act requiring notice to the court reporter is not performing the functions of informing the court that an appeal is being taken, but on the contrary, is to set up the new method of substituting the transcribed testimony for a bill of exceptions. It is manifest from the language of the Act that there is no court reporter authorized to make such a transcript for appeal to whom an appellant could give notice until September 1, 1943—the effective date of the Act. It must necessarily and logically follow that where a criminal case has been tried and judgment of conviction and sentence rendered prior to September 1, 1943, the defendant desiring to appeal was required under then existing law to give notice at the time and have the court to make a record thereof or he could give written notice and file the same with the clerk any time within six months from the date of the judgment. In either of these events he could prepare and have signed a bill of exceptions any time prior to September 1, 1943. If he did this the existing law applies and controls and a bill of exceptions must appear in the transcript, whether such transcript was prepared prior or subsequent to September 1, 1943. Under these conditions no duty rested on the party so appealing to give notice to and make request for a transcript of the evidence to a court reporter.

If on the other hand, the appealing party fails, after giving notice of appeal in the manner prescribed in said Section 368, to have a bill of exceptions perfected prior to September 1, 1943, then the Act is in full effect and he must use the new procedure of presenting reserved questions by notifying the court reporter to make a certified transcript of the evidence as provided in the Act. This involves a mere step in the procedure of getting the appeal before the higher court, and is a step taken after the new law on that particular step becomes effective and after the old law on such step becomes repealed by the new enactment.

Your third question should be answered in the negative. When a court reporter files a transcript of the evidence, properly verified, that transcript should be attached to and become a part of the record in the Appellate Court, and it will not be necessary for the clerk of said court to copy this transcript of the evidence, as was formerly done with bills of exceptions.

This covers all pertinent information called for in your letter. Your request to know the purpose of making a change from the old procedure belongs to the limbo of things to be forgotten.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 8, 1943.

Hon. Roy Johnson,

Tax Assessor,

Jefferson County,

Birmingham, Alabama.

Birmingham—Municipalities—Taxation—Title 51, Sections 698 and 700, Code 1940—

1. Levy of municipal taxes made by ordinance enacted in May cannot impose such taxes upon property annexed to such municipality the succeeding August.

2. When the first day of June is the final date upon which a municipality may certify to county tax assessor levy of municipal taxes, assessor is under no duty to reopen assessments in August to include newly acquired property.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for official opinion bearing date of September 16, 1943, is as follows:

"On August 10, 1943, an election was held in Jefferson County to determine whether or not a certain strip of territory between the City of Homewood and the City of Birmingham would come into the City of Birmingham.

"The citizens in this section voted to come in, and I am told, although I have never received a copy of the act, that the Legislature extended the boundary of the City of Birmingham to include this territory.

"The City of Birmingham has advised us that we are to collect taxes on this strip October 1, 1943. All our work has been done, and the bills turned over to the Tax Collector for 1943, and if we are to collect taxes on this territory it is going to cause a great deal of confusion, and we will be unable to get the bills to the Tax Collector by October 1st. Further than this, the City of Birmingham made their tax levy on the 10th of May, 1943, before this act was passed, and before the people had voted to come into the City.

"I refer you to an opinion of June 9, 1942, with reference to the City of Mountain Brook wherein the Hon. Thomas S. Lawson advised in the case of the City of Mountain Brook that June 1, 1942 was the dead line, and I therefore request your opinion with reference to the strip of land between the City of Birmingham and the City of Homewood, as to whether I shall bill them, and the Collector collect taxes on October 1, 1943 for the tax year 1944."

Your inquiry is answered in the negative.

The procedure by which the machinery for the assessment and collection of state and county ad valorem taxes may be invoked by a municipality for the assessment and collection of its taxes is set forth in Title 37, Section 700, Code of 1940 as follows:

"§ 700. Levy of taxes.—It shall be the duty of the council, board of commissioners, or other governing body of any such municipality during the month of May of each year, by resolution or ordinance, to levy a tax on the property situated in such municipality for the next succeeding tax year at a rate in no event in excess of the constitutional limit authorized to be levied by such municipality on the value of such property as assessed for state taxation as shown by the books of assessment for the state and county tax year ending the thirtieth day of September next succeeding the levy. The levy so made by the council, board of commissioners, or other governing body of such cities shall go into force and effect as of the first day of October next succeeding the levy and shall become a lien on the first day of October next succeeding such levy, and not before. After such levy is made it shall be the duty of the mayor or presiding officer or clerk or other clerical officer of such municipality on or before the first day of June next succeeding the levy to certify and deliver to the tax assessor of such county in which such municipality is situated a copy of the resolution or ordinance passed by such city council, board of commissioners or other governing body in and by which taxes are levied for such municipality for the next succeeding tax year commencing on the first day of the next succeeding October, provided in case such council, board of commissioners, or other governing body shall fail any year thereafter to make such levy and give such notice then the levy for the preceding year shall be continued and the taxes shall be assessed in accordance with provisions of this article."

Title 37, Section 698, Code of 1940, authorizes any municipality to provide by ordinance that its tax year shall commence on the first day of October of each year and end on the thirtieth day of the next succeeding September; that its taxes shall be based on state and county assessments for the pre-

ceding tax year; and that such taxes shall be due and delinquent at the time when the state and county taxes for the preceding tax year are due and delinquent.

Pursuant to Title 37, Section 700, Code of 1940, *supra*, the Board of Commissioners of the City of Birmingham, during the month of May, 1943, duly enacted an ordinance providing for the levying of municipal taxes for the tax year 1944, which ordinance, it appears, was certified to the Tax Assessor of Jefferson County on or before the first day of June, 1943. This ordinance, together with the certification thereof, placed upon the Tax Assessor of Jefferson County the duty of assessing for taxation property within the City of Birmingham, such assessments to be based upon the state and county assessments of such property for the preceding tax year. There was likewise placed upon the Tax Collector of Jefferson County the duty of collecting these municipal taxes, which taxes according to Title 37, Section 698, Code of 1940 are due and delinquent at the time when the state and county taxes for the preceding tax year are due and delinquent. Thus, taxes for the year 1944 for the City of Birmingham must be collected in advance, that is between October 1, 1943, and January 1, 1944.

On August 10, 1943, the residents of a certain territory adjacent to the City of Birmingham, pursuant to Act No. 358, S. 407, Acts of Alabama 1943, elected to come within the corporate limits of the City of Birmingham. The question presented by you is whether the levy made during the month of May 1943 by the Board of Commissioners of the City of Birmingham imposes upon this newly annexed territory *ad valorem* taxes for the tax year 1944, and whether, at this date, the Tax Assessor of Jefferson County must assess the property in such territory and direct the Tax Collector of Jefferson County to collect taxes thereon between October 1, 1943, and January 1, 1944.

It is my opinion that the property subject to these municipal taxes consisted only of property within the corporate limits of the City of Birmingham at the date of the levy of such taxes. Therefore, inasmuch as this newly annexed territory was not a part of the City of Birmingham at the time the ordinance levying the municipal taxes was enacted, and was not in any way subject to taxation by the City of Birmingham, it is inconceivable that its annexation to the City of Birmingham on August 10, 1943, subjected it to a municipal tax levied several months previous to such annexation.

Title 51, Section 700, Code of 1940, *supra*, requires an annual levy of municipal taxes, and not until another levy is made will taxes have been imposed upon their annexed territory.

Even if the above reasoning did not preclude the collection of such taxes from this newly annexed territory, it is my opinion that the provisions of Title 37, Section 700, Code 1940, *supra*, requiring the certification of the levy to the Tax Assessor before the first day of June, is further evidence that the Tax Assessor would be under no duty to assess additional property brought within the corporate limits of the municipality during the succeeding August. This statute contemplates the certification of the levy to the Tax Assessor on or before the first day of June next succeeding the levy in order to allow him sufficient time to compile the municipal assessments. It is my opinion that the machinery established for the making of such assessments does not provide for the reopening or amendment thereof to include newly annexed

territory. This conclusion is supported by the following opinions of this office:

Quarterly Report of the Attorney General, Vol. XVII, page 267, to Hon. J. E. McAdory, Deputy Tax Assessor, Jefferson County, under date of November 16, 1939.

Quarterly Report of the Attorney General, Vol. XVIII, page 236, to Hon. O. S. Nichols, Tax Assessor, Perry County, under date of February 17, 1940.

Quarterly Report of the Attorney General, Vol. XII, page 176, to Hon. R. C. Derby, Tax Assessor, Sumter County, under date of September 7, 1938.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 8, 1943.

Hon. W. Tunstall Searcy,

Register of the Circuit Court,

Tuscaloosa County, In Equity,

Tuscaloosa, Alabama.

LIBRARY TAX—

Not to be assessed in proceedings under General Act of 1943 No. 118 to establish the facts of birth.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for official opinion bearing date of September 30, 1943, is as follows:

"I respectfully request your opinion on the following questions: Should I, as Register of the Circuit Court of Tuscaloosa County, Alabama, in Equity, charge a Library Tax as provided in the Local Acts of 1936, page 34, in proceedings brought under House Bill 113 (Regular Session, 1943), being an act to provide for Court procedure to establish the facts of birth?

"Sections 2 and 3 of said House Bill Number 113 are as follows:

"Section 2. That cost involved in all matters provided in this Act be limited as follows: (a) The Clerk or Register of the Circuit Court or other court of like jurisdiction or the Probate Judge be allowed maximum costs of \$2.50. (b) That no State trial tax shall be imposed or collected in said cause. (c) The probate judge is allowed a fee of fifty cents (\$.50) for recording a certified copy of the court decree.'

"Section 3. That all laws or parts of laws which are inconsistent with the provisions of this Act are hereby repealed.'

"The library Fee bill, Acts of 1936, page 34, is as follows:

"Section 1: That in all civil, quasi civil, criminal, quasi criminal and equity actions, suits, cases and proceedings hereafter filed in or brought by appeal, certiorari or otherwise to the Circuit Court of Tuscaloosa County, Alabama, there shall be taxed as costs the sum of Two Dollars in each and every action, case, suit and proceeding therein, to be collected as other costs are collected and to be paid to and disbursed by the Clerk of the Circuit Court of Tuscaloosa County, Alabama; provided that in cases appealed from Recorder's Courts and in divorce cases where no alimony is awarded and in all civil and equity suits and proceedings where the amount of moneyed judgment or decree including court costs, is for less than Two Hundred Dollars only One Dollar shall be collected, and provided, further that no additional sum shall be collected in ancillary proceedings resulting from prior procedure in said Court. The sums so collected shall be expended by the Circuit Court of Tuscaloosa County by orders of the Presiding Judge thereof, for maintaining a Law Library for such Circuit Court and shall be expended only in buying law books and library furniture and for the Library of the Circuit Court of Tuscaloosa County, Alabama.'"

In my opinion the answer to your inquiry is in the negative.

The local act for Tuscaloosa County, part of which is quoted in your inquiry provides, with certain exceptions, for the payment of a fee in all suits and actions for the support and maintenance of a law library for the Circuit Court. Section 2 of the General Acts (General Act of 1943, No. 118, H. 113-Sightler) providing for the establishment of the facts of birth, in my opinion, limits the costs and fees to be charged notwithstanding the local law providing for a library tax.

In enacting the General Act, *supra*, to establish the facts of birth the Legislature made it possible for persons whose births were not registered to establish such fact in order to secure a birth certificate, which certificate is now generally required to secure employment. It is my opinion that Section 2 of the Act was inserted so that the cost of this procedure would not be excessive to those persons who are attempting to establish the facts of birth to secure a birth certificate and that by necessary implication the provision of the local act assessing a library tax for the Circuit Court of Tuscaloosa County is inapplicable.

The law of costs and fees must be strictly construed. It is also true that a local law is not repealed by a later general law unless the general law expressly or by necessary implication repeals the prior local law. It is my opinion, however, that so far as proceedings under General Act No. 118 are concerned, costs and fees must be strictly limited to those enumerated in Section 2 of the General Act.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 8, 1943.

Hon. E. P. Russell, Director,

Department of Corrections and Institutions,

Capitol.

Sheriff—Fees and Fingerprinting—General Acts of Alabama 1943,
Act No. 420—

When a person is taken into custody of the sheriff, charged with several different offenses, it is the duty of the sheriff to fingerprint him only one time.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of September 28, 1943, is as follows:

"In the regular session of 1943, the Legislature enacted into law house bill number (H-690 Johnston of Mobile) an act creating a fee of .10c to the sheriff for fingerprinting all defendants.

"In checking Circuit Court Cost Bills of Mobile County, I find seventeen (17) cases against one Neal R. Schaniel, numbering 4858 through 4874. In each of the cases mentioned against this defendant, the Clerk has charged under Sheriff's Fees .10c for fingerprinting in each case, making a total charge of Sheriff's Fees against this one defendant \$1.70.

"What we would like to know is the meaning of the Act quoted above and if the Clerk should charge this .10c fee to the sheriff's in each and every case. We find in checking Mobile Court Cost Bills out of the Cir-

cuit Court, 17 different cases and defendants where a charge has been made of fingerprinting in each and every case involved.

"Will you kindly give us the ruling on the above Act, in order that we may intelligently check the fees as enacted by the above Act."

It is my opinion that the answer to your inquiry must be in the negative.

Section 5 of the Act referred to in your request is as follows:

"Section 5. In each and every criminal prosecution these shall be taxed, as costs in the case, a sheriff's fee of \$.10 for taking fingerprints as required in Section 1. This fee shall be taxed and collected as other costs in the case."

This section considered by itself seems to require the fingerprinting of the defendant in each and every criminal prosecution. However, your attention is directed to Section 1 of the statute in question, which section actually imposes upon the sheriff the duty of taking the fingerprints of persons coming into his custody. This section is as follows:

"Section 1. It shall be the duty of the sheriff of each county in this state, who shall first take a person into custody, to fingerprint such person and furnish a copy of such fingerprints, with the fingerprint card properly filled out, to the Director of the Federal Bureau of Investigation, Washington, D. C., and a copy to the Director, Department of Public Safety, State Bureau of Investigation and Identification, Montgomery, Alabama."

Manifestly, the Legislature could not have intended that when a person was first taken into custody of the sheriff charged with numerous offenses that such person be fingerprinted for each separate offense. By the express terms of the statute, it is the taking into custody which places upon the sheriff the duty of taking the defendant's fingerprints, rather than the number of offenses with which he is charged. A contrary conclusion would result in useless duplication.

Therefore, in the case referred to in your request in which the defendant was taken into custody, charged with seventeen separate offenses, it is the duty of the sheriff to fingerprint such defendant only one time, for which he is entitled to a fee of ten cents.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 14, 1943.

Hon. I. C. Heck,

State Comptroller,

Capitol.

Sales Tax—Distribution of—Public Welfare—Code of 1940, Title 51, Section 784—Act No. 82, General Acts 1943—

A sum not to exceed \$650,000 per annum is available to counties for old age assistance exclusively provided counties' expenditures for public welfare purposes for the fiscal year 1942-1943 are maintained.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

I am in receipt of your request for an official opinion, dated July 8, 1943, which is as follows:

"Section 784 of Title 51 of the 1940 Code of Alabama was amended by Act No. 82, House Bill No. 25, approved June 2, 1943, which act provides in part for distribution to the several counties of a sum not to exceed \$650,000 per annum for old age assistance exclusively and which must be expended in addition to the counties present expenditures for public welfare purposes.

"What is the meaning of the phrase 'present expenditures for public welfare purposes'? Must the several counties expend for public welfare purposes an amount equal to their present expenditures in order to participate in the distribution of this part of the sales tax?"

"If it is your opinion that the several counties are not entitled to participate in the said sum of \$650,000 per annum unless they maintain the present expenditures, is it necessary that there be certified to me an estimated budget from each county providing for the appropriation of an annual amount equal to that appropriate for the present year, or is it necessary that there actually be made regular payments by each county upon such budget, before I am authorized to issue warrants to such county for their share of said fund?"

"For your information these funds derived from the sales tax have been in the past distributed as provided by law, monthly."

Act No. 82, House Bill No. 25, approved June 2, 1943, which act amended Section 784 of Title 51 of the 1940 Code of Alabama, provides in pertinent part as follows:

"If the amount of such collections in any fiscal year, remaining after the payment of the expenses of administration and replacement of the

amounts in the several funds as herein provided and distributed to the sixty-seven counties as herein provided, is greater than four million, two hundred thousand dollars, then an amount equal to one-fourth of such excess shall be divided and distributed among the sixty-seven counties of the State according to the population sixty-five years and over in age as shown by the last federal census; provided, however, that this one-fourth of such excess shall not exceed the sum of six hundred, fifty thousand dollars per annum, and provided further that this sum shall be expended by the counties for old age assistance exclusively **and in addition to their present expenditures for public welfare purposes.**" (Emphasis supplied)

A reading of Act No. 82, supra, discloses that the fiscal year is used as a basis for the distribution of the sales tax fund. State and County welfare department budgets are also set up on a fiscal year basis. It is therefore my opinion that the present fiscal year, that is, fiscal year 1942-43, should be used as a basis for determining the "present expenditures for public welfare purposes."

In view of the language of the above quoted portion of Act No. 82, supra, it is also my opinion that the several counties must maintain the present expenditures for public welfare purposes in order to participate in the allocation of this portion of the sales tax fund. Any other conclusion would nullify the expressed intention of the legislature to provide **additional monies** for old age assistance.

Inasmuch as the maintenance of present expenditures for public welfare purposes by the several counties is a condition precedent to such counties' participation in the excess sales tax fund the State Comptroller is not authorized to issue warrants to the several counties until there has been a legal compliance by the several counties with this condition. It is my opinion that the first step which must be taken by the several counties is the submission by them to the State Comptroller of a certified copy of their estimated annual budget, wherein it is indicated that there shall be appropriated for public welfare purposes an amount equal to or greater than that appropriated for public welfare purposes for the fiscal year 1942-1943.

Furthermore, payment thereof must be actually forthcoming before the State Comptroller is authorized to issue the warrants. However, as the proceeds from the sales tax fund in order to be practically applied to the purposes set forth in Act No. 82, supra, must be distributed on a monthly basis, and as the appropriations by the several counties are paid on a monthly basis, it is my opinion that the legislature did not intend that distribution of this portion of the sales tax fund be withheld until the end of the fiscal year; rather distribution thereof would be authorized each month upon the certification by the County Welfare Director that the county has, pursuant to its estimated budget theretofore submitted, appropriated for welfare purposes its average monthly portion, that is, one-twelfth of its annual appropriation.

It is my further opinion that as a part of the administration of the distribution of this fund you, as State Comptroller, may set some day in each month by which the counties must make their contribution in order to be entitled to participate in the distribution of the excess sales tax fund.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 15, 1943.

Hon. Howard Kirby, Clerk,

Circuit Court, Etowah County,

Gadsden, Alabama.

It is the duty of the circuit clerk when acting as ex officio clerk of the county court to issue all notices, summons and alias capias against defendant in criminal cases, and the clerks issuing such papers are entitled to regular fees allowed by law for same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of October 8, 1943, is as follows:

"Please render to me your opinion on the following matter as to County Court cases.

"Section 340 of Title 13 of the 1940 Code of Alabama, states: when a forfeiture has been taken against a defendant and the sureties on his bail bond, it shall be the duty of the Court to issue another warrant of arrest against the defendant, etc.

"The Judge of the County Court when entering a forfeiture vs. defendant and bail orders me in writing to issue Sci. Fa. notices to defendant and bail and also a Capias for the arrest of defendant. Should I sign capias ordered by the County Court Judge the same as I do capias ordered by the Circuit Judge?

"If the Judge of the County Court is due to sign a capias (writ of arrest on forfeiture) wouldn't I as Clerk of said Court be entitled to charge the fee allowed by law for writing up a capias and making record of Sheriff's return?"

In answering the above request I call your attention to Title 13, Section 315, Code of Alabama, 1940, which is as follows:

"§ 315. Clerks of circuit courts are ex officio clerks.—The clerks of the circuit courts of the several counties of the state are made ex officio clerks of the county courts of their respective counties."

You can see from the above that the Clerk of the Circuit Court is made ex officio Clerk of the County Court.

I now call your attention to Title 13, Section 316, Code of Alabama, 1940.

This section designates what fees the Clerk of the Circuit Court receives when acting as Clerk of the County Court and is as follows:

"§ 316. Fees of clerks.—The fees and compensation of said clerks for their duties as clerks of the county court shall be the same as now allowed by law to the clerks of the circuit court in criminal cases, and shall be paid in like manner."

You will note that Section 316, *supra*, states, "the fees and compensation of said clerks for their duties as clerks of the county court shall be the same as now allowed by law to the clerks of the circuit court in criminal cases, and shall be paid in like manner."

In order to determine what are the duties of the clerk we refer you to Title 13, Section 198, Code of 1940, and you will note this section begins with the following: "1. To sign and issue all summons, subpoenas, writs, executions, and other processes, under the authority of the court." Now to come more specifically to the question we have under consideration at this time we call your attention to Title 13, Section 340, Code of Alabama, 1940, which is as follows:

"§ 340. Alias warrant of arrest or subpoena.—When a forfeiture has been taken against a defendant and the sureties on his bail bond, it shall be the duty of the court to issue another warrant of arrest against the defendant, upon which the same proceedings shall be had as upon the original warrant; and when a forfeiture has been entered against a witness for non-attendance another subpoena may be issued for him, upon which the same proceedings may be had as upon the original subpoena."

Therefore, when a forfeiture is taken on the appearance bond of a defendant in a criminal case and the Judge of the County Court makes an order forfeiting such bond and ordering an alias *capias* for the arrest of the defendant it is your duty as clerk to issue all notices, *capiases* in connection with and carrying out the orders of the Court under the provisions of Title 13, Section 198, *supra*, and such clerk is entitled to the regular fee prescribed by law for any or all of these services which includes the issuing of the *capias* and recording the sheriff's return.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 20, 1943.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

Department of Finance,

Capitol.

Local Act attempting to reserve 50% of traffic fines to general fund of county held unconstitutional in that respect. (Const. 105, Tit. 36, § 53, Acts 1943, No. 320, S. 365.)

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for official opinion, bearing date of September 8, 1943, is as follows:

"Please refer to Senate Bill 365, approved by the Governor June 30, 1943, and Section 52, Title 36, 1940 Code, and advise me in answer to the following:

"In the light of Section 53, of Title 36, is the Local Act, Senate Bill 365, constitutional?"

In my opinion that part of Senate Bill No. 365-Madison, No. 320 providing that fifty percent of the fines collected for violation of the traffic laws, which fines under the general statute go to the Department of Public Safety, shall be paid into the General Fund of Tuscaloosa County, is unconstitutional and void because such provision violates section 105 of the Constitution of Alabama.

By Title 36, Section 53, the general law provides:

"§ 53. Fines and forfeitures.—All fines and forfeitures collected upon conviction or upon forfeiture of bail of any person charged with a violation of any of the provisions of this chapter constituting a misdemeanor, shall be within thirty days after such fine, or forfeiture is collected forwarded to the treasurer. All amounts received from such fines or forfeitures shall be credited to the highway patrol fund. Failure, refusal or neglect to comply with the provisions of this section shall constitute misconduct in office and shall be ground for removal therefrom. Provided that all fines and forfeitures collected by recorders courts or other municipal courts for violation of ordinances, in cities and towns of over two thousand population according to the last or any subsequent census, whether for acts constituting violations of the provisions of this chapter or not, shall be paid into the treasury of such municipality in which the same was collected."

The local law (Acts 1943, No. 320, S. 365-Madison) provides:

"Section 1. All fines imposed and all forfeitures made final, in the Inferior Court of Tuscaloosa County, when collected, shall within thirty days, be paid into the general fund of Tuscaloosa County, any general or local law to the contrary notwithstanding provided however that only fifty percent (50%) of fines collected for violation of the traffic laws, which fines under general statute go to the Department of Public Safety, shall be paid into the General Fund of Tuscaloosa County."

Section 105 of the Constitution of Alabama, 1901 provides:

"Sec. 105. No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law."

It is to be noted that the general law (Title 36, Section 53) provides that the fines and forfeitures collected for violations of the provisions of Chapter 1, Title 36, consisting of the "Rules of the Road" or "traffic laws" shall be forwarded to the treasurer and credited to the Highway Patrol Fund; while the Tuscaloosa County Local Law, *supra*, provides that only fifty percent of such fines be sent to the treasurer and the remaining fifty percent is credited to the general fund of the county.

It is my opinion that the **disposition** of fines and forfeitures collected for traffic violations is a "case which is provided for by a general law," (Title 36, Section 53), (Constitution, Section 105) and that the legislature is prohibited from enacting a purely local law making a local disposition of such moneys.

It is well known that the fines and forfeitures collected and sent to the State Treasurer under the general law (Title 36, Section 53) and credited to the Highway Patrol Fund constitute a part of the funds used to maintain and operate a state-wide law enforcement organization the benefits of which accrue to every county in Alabama. To dispose of the moneys designated for this purpose by the general law by attempting to divert it to a county fund by a local law is, in my opinion, a violation of the prohibition set out in Section 105 of the Constitution of 1901. *Aeuff v. Weaver*, 17 Ala. App. 532, 86 So. 167; *Evans v. Long*, 227 Ala. 335, 149 So. 837; *Norwood v. Goldsmith*, 186 Ala. 224.

Insofar as the Local Act, *supra*, attempts to reserve fifty percent of fines for traffic violations to the general fund of Tuscaloosa County the Act is void. Since the remaining part of the Act is separable and not questioned we give no opinion as to that part.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 26, 1943.

Hon. Hayse Tucker, Director,

Department of Finance,

Capitol.

Schools—State Superintendent of Education—Comptroller—Treasury—Section 258 Const. 1901—Title 52, Sections 38, 39, 40—Title 55, Chapter 4—

1. Private gifts to schools, administered by State Superintendent of Education in official capacity, shall be deposited in trust in State Treasury.

2. Comptroller shall issue warrant on requisition of Superintendent of Education payable from particular trust fund in State Treasury designated by requisition, and is not responsible for pre-audit and/or legality of same.

3. It is the Treasurer's duty to receive gift funds and set up same in a particular trust fund in State Treasury, and pay warrants issued against such particular fund.

Opinion by Assistant Attorney General Lurie.

Dear Sir:

Your request for an official opinion, dated October 7, 1943, is as follows:

"The Department of Education, in several instances is the recipient of private donations or gifts the principal and/or interest of which shall be expended for educational purposes to a certain class of schools or students in accordance with the donor's instructions. The State superintendent of Education, as trustee for such donations, has executed the trust by placing the funds in a banking institution within the State and disbursing same by voucher in his official capacity.

"Your official opinion is requested upon the two questions propounded herein relative to the above.

"1. May the State Superintendent deposit such funds in the State Treasury in trust (where the trust agreement is silent upon place of deposit) to be expended upon requisition by the State Superintendent on Comptroller's warrant in execution of the trust?

"In the event your answer to the above question is in the affirmative, then,

"2. Is the audit and legality of such expenditures subject to challenge

by the State Comptroller, when requested on proper requisition to issue a warrant therefor?

"For convenience your attention is directed to Title 52, Chapter 3, Title 55, Sections 73, 81, 101, 102, 103, 104, also Section 258 of Constitution 1901.

"An early ruling is requested in view of the fact that the new fiscal year is just starting, and we would like to make proper disposition of these trust moneys."

The framers of our Constitution gave proof of a marked degree of foresight when they set up and attempted to preserve our system of public schools, and provided for the faithful maintenance of them throughout the years. Those who convened in 1901, gave definite expression to their views and ideas in Section 258, Constitution of 1901, which provides as follows:

"Sec. 258. All lands or other property given by individuals, or appropriated by the state for educational purposes, and all estates of deceased persons who die without leaving a will or heir, shall be faithfully applied to the maintenance of the public schools."

It would be only just to give to that Section the same import and the same overall construction that those men implied and intended, when, in the consideration of all the vast governmental functions, they considered it tantamount to preserve the public schools of this State so long as Alabama remains a State.

It is from this Section that the Legislature created the statutes empowering the State Department of Education to receive donations and gifts from individuals, as evidenced by Sections 38, 39, and 40, Title 52, 1940 Code of Alabama. These sections, as may be seen from a study of them in conjunction with Section 258, *supra*, are but an attempt to designate to the State Department of Education the power to receive and administer such gifts and donations, and to properly place the responsibility of disbursing such donations where all moneys appropriated by the State for educational purposes are placed for expenditure.

It would be folly, in the face of our present system of laws, to contend that any department, bureau, or agency of the State is vested with the authority to expend any of its funds through private banks, personal accounts, or in any manner other than through the regular channels, as provided by the Constitution and the statutes pursuant thereto. (Title 55, Chapter 4, 1940 Code of Alabama.) Where such procedure is followed, it is done so at the express direction of the Legislature. Such a procedure would, indeed, be a violent departure from the general plan, and to adopt such authority, it is essential and elemental that it be supported by a specific Act by our lawmakers. I have been unable to find any provision of law wherein the Legislature has directed the State Department of Education to expend or disburse funds in such a manner.

It may be contended that such moneys are not State moneys, and that they are not moneys appropriated for public schools. But such contention is

successfully rebutted by a fair interpretation of Section 258, supra. **"All funds" are contemplated therein.** It may be urged that the State Superintendent of Education is charged with the duty to administer the donations, and that by virtue of such charge he is acting in the personal capacity of trustee. That contention is met and overcome by the fact that the State Superintendent of Education is trustee of such donation solely by reason of his official capacity . . . that such trusteeship is vested in his office, and not in the individual. This position is fortified by the fact that such administration and management of the donation descends to his successors in office, and is not culminated upon his retirement. The entire motive and the ends sought to be obtained by the donor are but a part of the advancement of our system of public schools, and, as such, were anticipated by the drafters of Section 258, supra, and are within its scope, and thus the administration of any gift or trust for educational purposes is a function of the State Department of Education as an agency, arm, and branch of our State Government, and not as an individual.

In view of the above it is my opinion that it is the duty of the State Superintendent of Education to place all funds coming within his charge and/or control, as an official, in the Treasury of the State of Alabama. In the event such funds are derived from a gift or donation contemplating a trust, then the same shall be placed in the treasury in an appropriate "trust fund."

The answer to your second question is in the negative.

The duties of the Comptroller, as defined by Title 55, Section 81, 1940 Code of Alabama, relate to the moneys appropriated or allocated by the State; and the method of withdrawal of such funds by warrant of the Comptroller carries with it the necessary care and caution to be exercised by him, and thereby extends to him the right to pre-audit and determine the legality of each requisition. However, in the type of funds which are under consideration in this opinion the duty of Comptroller is to merely issue the warrant upon requisition of the State Superintendent of Education, and he is not charged with the responsibility of the legality of the same. Section 81, insofar as this type of expenditure is concerned, merely prescribes the procedure for the withdrawal of the money. Nor does Title 55, Section 103 of the 1940 Code of Alabama present any obstacle to the withdrawal of such fund. See opinion of the Attorney General to J. D. Petree, February 6, 1942; Quarterly Reports, Volume 26, page 90.

It is the duty of the Treasurer of the State of Alabama to receive and keep such moneys as discussed herein, and set up same in appropriate "trust funds" in the State Treasury. The authority for such procedure may be found in Title 55, Section 211, 1940 Code of Alabama, which provides in pertinent part as follows:

"Section 211. Powers, functions and duties.— *** To perform such other duties as are, or may be, by law required of him. *** "

The conclusions of this opinion are based upon the assumption that there is no restriction by the donor upon the place of deposit for the gift or trust

fund, and nothing herein shall be construed as interpretive of the laws governing trusts as provided in Title 58, Code of Alabama, 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 26, 1943.

Hon. E. P. Russell, Director,

State Department of Corrections and Institutions,

Montgomery, Alabama.

Pardon, Parole and Probation—Prisons and Prisoners—Sentence—
Deductions—General Acts 1943, Act No. 534.

A prisoner who is returned to the penitentiary upon revocation of his parole is not entitled to the benefit of Act No. 534, S. 353, General Acts of Alabama, 1943.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, dated October 22, 1943, is as follows:

"It is requested that an official opinion be rendered this Department as to whether a prisoner who is returned to the penitentiary on revoked parole, forfeits all earned good time that has accrued to his credit while serving his sentence in confinement, either in the penitentiary or at hard labor for the county, whose institutional conduct had otherwise been good."

The foregoing inquiry seeks an interpretation of Act No. 534, S. 353, General Acts of Alabama, 1943, extending to convicts then incarcerated deductions for good behavior.

It is my opinion that a prisoner who is returned to the penitentiary upon revocation of his parole is not entitled to such deductions under Act No. 534, *supra*.

In the absence of any judicial determination of the question presented by you, the light of reason must guide us to an equitable and just interpretation of the statute. The manifest purpose of this "good conduct" statute is

to offer a credit to the prisoner in the nature of a reward for his good behavior. That such a statute is an expression by the Legislature of its humanitarian motives is indisputable.

However, this credit or reward is contingent upon the prisoner's compliance with the rules and laws governing good conduct. A violation of these rules or laws by him by the provisions of the statute forfeits the privilege of the allowed deductions. This fundamental basis upon which the deductions are predicated could not be inapplicable when the prisoner is a parolee at the time of such violation.

In an opinion of this office under date of August 11, 1943, to Mrs. Edwina Mitchell, Associate Member of the Board of Pardons and Paroles, it was held that the deductions allowed in the said Act No. 534 did not extend to prisoners during the time they were on parole. The basis for this holding was that the statute applied to "each prisoner who *** is confined *** in the penitentiary ***," and that a parolee, not being actually confined in the penitentiary, is not entitled to the deductions therein granted. Although actual confinement in the penitentiary is necessary for the granting of such deductions, the language used in the said Act No. 534 does not require that the act of misconduct, upon which the forfeiture of the deductions is based, occur during the prisoner's actual confinement. Rather the statute, by requiring that the prisoner "has faithfully observed all the rules and has not been subjected to punishment," manifestly presupposes good behavior throughout the term of such person's sentence, whether he is a parolee or is actually confined, before he is entitled to the deductions from his sentence.

This conclusion is further substantiated by the case of *Pinkerton v. State*, 29 Ala. App. 472, 198, So. 157, which held that even though a parolee was serving his sentence outside of prison walls, he was, nevertheless, in the legal custody of the warden of the prison from which he was paroled until the expiration of his sentence, and that although his parole was an amelioration of his punishment, it was still punishment and imprisonment in legal effect. Therefore, it is my opinion that so long as the parolee is in the legal custody of the warden any act of misconduct subjects him to a forfeiture of his parole, thereby disentitling him to the benefits of Act No. 534, supra.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 26, 1943.

Hon. R. A. Polglaze, Secretary,

Board of Registration for Professional Engineers and Land Surveyors,

1002-3 Empire Building,

Birmingham, Alabama.

Engineers and Land Surveyors—Title 46, Section 144, Code of 1940—Act No. 543, H. 475, Acts of Alabama of 1943.

Act No. 543, H. 475, Acts of Alabama 1943, is inoperative until December, 1943, and, therefore, the limited period of ten months during which registrants may renew their certificates is inapplicable to those registrants who are now delinquent.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for official opinion bearing date of October 16, 1943, is as follows:

"Section 144, Title 46, Chapter 7, 1940 Code of Alabama, provides, among other things, the following:

" RENEWAL MAY BE AFFECTED AT ANY TIME DURING THE MONTH OF DECEMBER BY THE PAYMENT OF A FEE OF FIVE DOLLARS. THE FAILURE ON THE PART OF ANY REGISTRANT TO RENEW HIS CERTIFICATE ANNUALLY IN THE MONTH OF DECEMBER AS REQUIRED ABOVE SHALL NOT DEPRIVE SUCH PERSON OF THE RIGHT OF RENEWAL, BUT THE FEE TO BE PAID FOR THE RENEWAL OF A CERTIFICATE AFTER THE MONTH OF DECEMBER SHALL BE INCREASED TEN PERCENT FOR EACH MONTH OR FRACTION OF A MONTH THAT PAYMENT OF RENEWAL IS DELAYED: PROVIDED, HOWEVER, THAT THE MAXIMUM FEE FOR DELAYED RENEWAL SHALL NOT EXCEED TWICE THE NORMAL RENEWAL FEE."

"H-475—Sullivan, Approved July 12, 1943, amends Sections 144 to read in part as follows:

" RENEWAL OF CERTIFICATES OF REGISTRATION FOR THE FOLLOWING YEAR MAY BE EFFECTED AT ANY TIME DURING THE MONTH OF DECEMBER OF THE YEAR IN WHICH SUCH CERTIFICATE HAS BEEN ISSUED OR RENEWED BY THE PAYMENT OF THE RENEWAL FEE SO FIXED BY THE BOARD. SUCH CERTIFICATES MAY ALSO BE RENEWED DURING THE ENSUING TEN MONTHS BY THE PAYMENT OF AN ADDITIONAL FEE OF FIFTY CENTS FOR EACH MONTH, OR FRACTION

THEREOF THAT PAYMENT OF THE FIXED RENEWAL FEE IS DELAYED BEYOND THE MONTH OF DECEMBER'

"We have several registered engineers who did not renew their 1942 or 1943 registration and under the provision of the original Act may renew upon the payment of Ten Dollars.

"The Board requests that I write you for an opinion on the effect that the Amendment, referred to above, has on the renewal rights of the registrants.

"The specific information desired is: (a) Whether or not the right to renew a Certificate expires after the expiration of ten months, as apparently provided for in this Amendment, and (b) Whether or not the registrants who are delinquent for a period longer than ten months now have the right to renew their Certificates."

In answer to your first inquiry, it is my opinion that the right to renew a certificate expires at the end of the tenth month following the December in which the renewal could have first been effected. The Legislature, by providing this ten-months' period of grace with a penalty of an additional fee of \$.50 for each month, expressly established the period in which renewal could be effected, and the Board is without authority, and the registrant is without the right, to effect a renewal after the expiration of the ten-months' period.

In answer to your second inquiry, it is my opinion that those registrants who are now delinquent for a period longer than ten months are not precluded by Act No. 543, amending Title 46, Section 144, Code of 1940.

It is my opinion that the said Act No. 543 is inoperative until December, 1943. This amendment to Section 144 provides that certificates shall expire on the last day of the month of December following their issuance, that it shall be the duty of the Secretary of the Board to notify every registrant of the date of the expiration of this certificate at least one month in advance of said date, that renewal of certificates for the following year may be effected at any time during the month of December, or during the ensuing ten months, by the payment of an additional fee of \$.50 for each month.

By the very language of this amendment its provisions can have no effect until December, 1943. Not until the end of the period of ten months following December, 1943, will the right of a registrant to renew the certificate be terminated. There is no provision of the said amendment making it retroactive nor does there appear any legislative intent to make it applicable to existing certificates. It is so phrased as to become operative during the December following its enactment, i. e., December, 1943.

Therefore, it is my opinion that those registrants who are now delinquent are, until after December, 1943, subject to the renewal provisions of Title 46, Section 144, Code of 1940, which statute places no limitation upon the time during which renewals may be effected. Although it was within the power of the Legislature to terminate this right of renewal immediately, by virtue

of the language used in Act No. 543, it chose to designate December, 1943, and the ensuing ten months as the limited period for such renewal.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 26, 1943.

Hon. R. A. Polglaze, Secretary,

Board of Registration for Professional Engineers and Land Surveyors,

1002-3 Empire Building,

Birmingham, Alabama.

Engineers and Land Surveyors—Title 46, Section 141, Code of 1940
—Act No. 543, H. 475, Acts of Alabama 1943.

Act No. 543, Acts of Alabama 1943, amending Title 46, Section 141, Code of 1940, does not give those applicants, who before the passage thereof had not paid the remaining \$10.00 due upon their certificates, the right to pay such amount upon thirty days' written notice, such right having been forfeited under Title 46, Section 141, Code 1940, upon their failure to pay said amount upon issuance of their certificates.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion bearing date of October 16, 1943, is as follows:

"Section 141, Title 46, Chapter 7, 1940 Code of Alabama, provides, among other things, the following:

" THE REGISTRATION FEE FOR PROFESSIONAL ENGINEERS SHALL BE TWENTY-FIVE DOLLARS, FIFTEEN OF WHICH SHALL ACCOMPANY APPLICATION, THE REMAINING TEN DOLLARS TO BE PAID UPON ISSUANCE OF CERTIFICATE."

"H-475—Sullivan, Approved July 12, 1943, amends Section 141 to read in part as follows:

"..... THE REGISTRATION FEE FOR A CERTIFICATE AS A "PROFESSIONAL ENGINEER" SHALL BE TWENTY-FIVE DOLLARS, FIFTEEN OF WHICH SHALL ACCOMPANY THE APPLICATION, THE REMAINING TEN DOLLARS OF WHICH TO BE PAID BEFORE ISSUANCE OF CERTIFICATE. SHOULD THE APPLICANT FAIL OR REFUSE TO REMIT THE SAID REMAINING TEN DOLLARS WITHIN THIRTY DAYS AFTER BEING NOTIFIED, IN THE USUAL MANNER, THAT THE APPLICANT HAS SUCCESSFULLY QUALIFIED, THE APPLICANT SHALL FORFEIT THE RIGHT TO HAVE A CERTIFICATE SO ISSUED AND SAID APPLICANT MAY BE REQUIRED TO AGAIN SUBMIT AN ORIGINAL APPLICATION AND PAY AN ORIGINAL FEE THEREFOR."

"We have several Certificates held in this office approved in prior years on which the remaining Ten Dollars has not been paid and are, therefore, not in effect.

"The Board requests that I write you for an opinion on the effect that the Amendment, above referred to, has on the Certificates on which the remaining Ten Dollar Fee has not been paid.

"The specific information desired is whether or not these Applicants have the right now to pay the remaining Ten Dollars, upon thirty days written notice, and receive their Certificates."

It is my opinion that Act No. 543, H. 475, amending Title 46, Section 141, Code of 1940, does not entitle those applicants, who have not, before the passage of the said amendment, paid the remaining \$10.00 upon the issuance of their certificates, to the right to now pay such amount within a period of thirty days following written notice.

The original Act found in Title 46, Section 141, Code of 1940, provided that the remaining \$10.00 must be paid upon issuance of the certificate. In the absence of any provision establishing a definite period during which the applicant could pay the remaining \$10.00, apparently, it was the legislative intent that the failure to pay the said \$10.00 upon the issuance of the certificate by the Board, as provided by the said Section 141, forfeited the right of the applicant to have his certificate issued. The statute unequivocally requires the payment of the remaining \$10.00 "upon issuance of certificate" by the Board.

Said Act No. 543, containing no clause to make it retroactive, is applicable only to applications for certificates after the effective date of the statute, and it is, therefore, my opinion that the provisions thereof for the thirty days' notice are inapplicable to those applications for certificates made prior to the passage of the said Act.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

October 28, 1943.

Hon. Howard Kirby,

Clerk of the Circuit Court,

Etowah County,

Gadsden, Alabama.

The fact that the County Court organized under the General Laws of the State is not a court of record, yet when certain papers or documents pertaining to any case in said court are required to be recorded, the clerk is entitled to the regular fee for such work. This service is not performed for the purpose of making the final records of the case, but for the purpose of preserving such documents in order that they may be substituted in case they are lost, stolen or destroyed.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion bearing date of October 21, 1943 is as follows:

"Please refer to an opinion rendered September 13th, 1943, to Hon. Ben P. Singleton, Chief Examiner of Public Accounts, and render to me your opinion on the following matter.

"As Ex Officio Clerk of the County Court I record the Affidavit and Warrant and Appearance Bond in each County Court case, which is known as the final record.

"Wouldn't it be legal for me as Clerk of said Court to continue recording of the Affidavit and Warrant and Appearance Bond in each County Court case and charge the fee which has been allowed for many years and now being allowed for said services?"

My answer to the above is in the affirmative.

The fact that the County Court organized under the general laws of the State, of which the Judge of Probate is Ex Officio Judge, is not a court of record, does not mean that the Clerk of said court is not entitled to the regular fee for performing the service of recording such papers and documents as it required by law to be recorded.

The recording of papers you refer to is not done for the purpose of making a final record of the case (although it may be designated as such), but is for

the purpose of substituting such papers in case they are lost, stolen or destroyed.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 3, 1943.

Hon. H. M. Hughes, Clerk,

Circuit Court of Madison County,

Huntsville, Alabama.

Code 1940, Tit. 61, § 63—Tit. 7, § 518—Contest of Wills—Costs in Circuit Court—

1. Upon judgment of the circuit court sustaining a will under a contest therein authorized by Code 1940, Tit. 61, § 63, and return of execution against the contestants as defendants in the circuit court for costs taxed against them "no property found," the clerk of the circuit court may issue execution against the proponents of the will as plaintiffs upon the contest in the circuit court for all costs created by them in obtaining their judgment sustaining the will, and costs so paid by them will upon settlement of the estate be proper charges against the estate.

2. Opinion of Attorney General, September 19, 1939, Quarterly Report, Vol. XVI, p. 258 is withdrawn.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion, bearing date of October 19, 1943, is as follows:

"I would like for you to render to me your official opinion as to costs and how collectable in contest will cases.

"I have just had a will contest case, certified from the Probate Court to the Circuit Court and same was tried by a jury and a verdict was rendered, 'We, the Jury, find for the proponents and in favor of the validity of the will.' According to Title 61, Section 63, it is my duty to certify to the transcript of judgment of Circuit Court with all papers and documents therefor certified to the Circuit Court by the Probate Court back to the

Probate Court from which they were first certified to Circuit Court. The point that I am working to under Title 61, Section 59, when the judgment is rendered against the contestees and execution has been issued and returned no property found, can the Probate Judge assess such costs that have accrued by the proponents against the proponents and same be paid out of the estate by the executors of the will?"

The contest of a will may be transferred from the probate court to the circuit court, whereupon "the cause shall be docketed by the clerk of the circuit court, *** and the trial had in all other respects as trials in other civil cases in the circuit court." Code 1940, Tit. 61 § 63.

No basis for distinction with respect to costs is perceived as between such contests in the circuit court and "other civil cases" in said court.

Code 1940, Tit. 7, § 518 authorizes issue of execution "against the plaintiff, in the name of the clerk or register of the court, for all the costs created by him in obtaining his judgment," in cases where "execution against defendant is returned 'no property found.'"

I am of opinion, therefore, that under the circumstances stated you, as circuit clerk, are authorized to issue execution against the proponents of the will for probate for such costs as were created by them as plaintiffs in the circuit court in the discharge of their duty to sustain the will, and upon payment thereof they would be entitled to credit therefor upon settlement of the estate.

Code 1940, Tit. 61, § 59 is without application to contests tried in the circuit court. It relates only, as apparent from preceding sections, to taxation of costs upon contests tried in the probate court.

I am of opinion that execution for such costs should be issued by the circuit clerk and not by the probate judge upon remandment of the cause to the probate court as required by Tit. 61, § 63.

In any event such costs, however and whenever paid, if incurred or created by the executors in good faith in an effort to sustain the will, are a proper charge against the estate upon partial or final settlement, for which the executors may take credit.

The opinion of this office rendered September 19, 1939, to Hon. William A. Conrad, Clerk Circuit Court, Mobile County, (Quarterly Report, Attorney General, Vol. XVI, p. 258) is in conflict herewith and therefore set aside and withdrawn.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 4, 1943.

Hon. William A. Conrad,

Clerk Circuit Court,

Mobile County,

Mobile, Alabama.

1. When a defendant is bound over on a preliminary investigation to the Grand Jury of the Circuit Court without bail or with bail which the defendant fails presently to make and is placed in jail the guard fee becomes a part of the costs of the Circuit Court, also the approval of the bond of the defendant in case he makes bond before the Grand Jury convenes.

2. When a defendant is convicted and sentenced either to hard labor or to the penitentiary and is ordered by the Court held in jail to await being transferred to the State penitentiary the guard fee of the sheriff for this service becomes a part of the Circuit Court costs.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion bearing date of September 29, 1943, is as follows:

"In a case where the Sheriff arrests a defendant on a felony warrant issued out of the Inferior Criminal Court of Mobile County and placed said defendant in jail under said warrant (**first Guard fee**); and then defendant enters into an appearance bond (**first bond**) for his appearance before the Inferior Court on preliminary hearing, and on the preliminary hearing said defendant is bound over to the Grand Jury under bond we will say of \$1,000.00; and then the Sheriff places said defendant in jail (**second Guard fee**) pending his entering into bond; and defendant thereafter before indictment enters into said bond (**second bond**); and thereafter the Grand Jury returns an indictment against the said defendant for said felony; and on the trial in the Circuit Court defendant is convicted and sentenced to imprisonment in the penitentiary (**third Guard fee**), therefore, I respectfully request Your Honor's opinion on the following questions, viz.:

"1. To which does the second guard fee and second bond attach, the Inferior Criminal Court costs or the Circuit Court costs?

"2. On conviction in the Circuit Court defendant is remanded to jail awaiting transfer to the penitentiary, would or not a guard fee attach to the Circuit Court costs for a third guard fee?"

In answering your first request it is my opinion that the second guard fee and the fee for approving the second bond is a part of the Circuit Court costs for the reason when these fees attach the case has already been disposed of so far as the Inferior Criminal Court of Mobile is concerned. As soon as the Judge of the Inferior Court makes the order binding the defendant over to the Circuit Court and Grand Jury and fixes the amount of bond, if bailable, such Inferior Court loses all jurisdiction of the defendant and the subject-matter and the defendant failing to presently give bail fixed by the Court is placed in jail to await the action of the Grand Jury of the Circuit Court. If, after being placed in jail, he makes bond it is for his appearance not in the Inferior Court but in the Circuit Court and from time to time until the case is disposed of.

My answer to your second request is in the affirmative for the reason the placing of the defendant in jail after conviction to await transfer to the penitentiary is simply carrying out the orders of the Judge of the Circuit Court, and this being true, I am of the opinion it becomes a part of the costs of the Circuit Court.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 4, 1943.

Hon. W. C. Harrison,

Associate Commissioner,

Public Service Commission,

Capitol.

Public Service Commission—Motor Transportation Companies—
Motor Carrier Act of 1931, General Acts of Alabama 1931, page 303—
Motor Carrier Act of 1932, General Acts of Alabama 1932, page 178.

Common carrier who has obtained a certificate of public convenience and necessity under the Motor Carrier Act of 1931 is not precluded from obtaining a permit to operate under the Motor Carrier Act of 1932, provided that the nature of the operations of such carrier brings it within the provisions of both acts.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for official opinion bearing date of September 25, 1943, is as follows:

"Subsection 'C' of Section 1 of an act defining contract and common carriers, approved October 28, 1932, (See page 178—General Acts of Alabama, Extra Session 1932) provides as follows:

"(c) 'Common carrier' means any operator of a motor vehicle who engages in the motor transportation business for hire as a public employment, provided, however, neither the term 'common carrier,' nor any other provision of this Act, shall be construed to mean or indicate any motor transportation company or common carrier subject to the provisions of the Alabama Motor Carrier Act of 1931.'

"Could a common carrier who had previously obtained, and still operated under, a certificate of public convenience and necessity under the provisions of the Alabama Motor Carrier Act of 1931, procure and qualify to operate as a common carrier under the above Motor Carrier Act of 1932 in the same territory the carrier operated under the certificate obtained under Motor Carrier Act of 1931?

"Could such a carrier qualify under Act of 1932 to operate in any other territory in Alabama other than that in which he was qualified to operate under Act of 1931, or would such carrier be required to qualify for such other territory under Act of 1931?"

Inasmuch as the Motor Carrier Acts of 1931 and 1932 were repealed and superseded by Act No. 669, Acts of Alabama 1939, approved June 5, 1940 (Title 48, Sections 301(1)-301(51), Code of 1940), it is presumed that the circumstances giving rise to the questions presented by you are of such date as to bring them within the operation of the Motor Carrier Acts of 1931 and 1932.

In answer to your first inquiry it is my opinion that a common carrier who had obtained a certificate of public convenience and necessity under the provisions of the Motor Carrier Act of 1931 would not be precluded from obtaining a permit to operate a common carrier under the Motor Carrier Act of 1932.

The Motor Carrier Act of 1931, General Acts of Alabama 1931, page 303, is expressly applicable only to motor transportation companies operating between fixed termini or over regular routes and who hold themselves out to carry for hire all persons or goods so long as they have room. Such motor transportation companies, before authorized to engage in business, must be granted by the Alabama Public Service Commission a certificate of public convenience and necessity. It is the statutory duty of the commission to determine whether such certificate should be granted, taking into consideration the adequacy of existing transportation, the financial ability of the applicant, the advantages to the public, and the effect and expense on the public highways.

The Motor Carrier Act of 1932, General Acts of Alabama 1932, page 178, as set forth in the section quoted in your request, is applicable only to those common carriers engaged in the motor transportation business for hire who are not subject to the provisions of the Motor Carrier Act of 1931, *supra*, that is, to those common carriers who do not operate between fixed termini or over regular routes. By virtue of Section 9 of the Act of 1932 any common carrier meeting the qualifications prescribed therein and upon payment of the stipulated fee may, as a matter of right, obtain from the Judge of Probate a permit authorizing such carrier to operate.

In the absence of any provision of law to the contrary, it is my opinion that the Motor Carrier Act of 1931 and the Motor Carrier Act of 1932 are not mutually exclusive; rather, each of said acts is applicable to those carriers coming within the classifications contained therein, which classifications are based upon the nature of the operations of common carriers. It follows that if the operations of one common carrier brought it within the classification of both statutes, such carrier would be subject to the provisions and requirements of both statutes. Categorically, a common carrier who obtained a certificate of public convenience and necessity under the Motor Carrier Act of 1931 would be entitled, as a matter of right, to a permit from the Probate Judge authorizing it to operate under the provisions of the Motor Carrier Act of 1932, if such carrier came within the prescribed qualifications of said Act. In such instance there is no legal authority for the refusal of such permit.

Your second inquiry presents for consideration the question of whether a common carrier who has qualified to operate in a certain territory under the Motor Carrier Act of 1931, and who desires to make application for operation in another territory, would be required to qualify under the Motor Carrier Act of 1931, or could choose to qualify under the Motor Carrier Act of 1932. It is my opinion that it is immaterial that the common carrier qualified to operate in a certain territory under the Act of 1931. In determining the Act under which it must qualify to operate in another territory, it is necessary to look to the nature of such operation. If it operates between fixed termini or over regular routes, then it must obtain from the Alabama Public Service Commission a certificate of public convenience and necessity authorizing it to operate in such territory. If the carrier does not operate between fixed termini or over regular routes but comes within the provisions of the Motor Carrier Act of 1932, it is necessary for it to obtain a permit from the Probate Judge for authority to engage in business.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 5, 1943.

Hon. I. C. Heck,

State Comptroller,

Capitol.

Code 1940, Tit. 41, § 60, 77—Act No. 114, S. 164, approved June 8, 1943—Official Bonds—Tax Collector—Extended term—

1. Tax Collector's official bond filed after June 8, 1943, should be conditioned "faithfully to discharge the duties of his office, which are or may be required of him by law during the time he continues therein, or discharges the duties thereof."

2. (a) Tax Collector's official bond filed prior to June 8, 1943, should be supplemented by an additional bond, conditioned as required by Code 1940, Tit. 41, § 60, covering the time of the extension of his office made by Act No. 114, S. 164, approved June 8, 1943; or (b) the comptroller may require a new bond to be executed and filed, conditioned as required by Tit. 41, § 77, as a substitute for the original bond filed prior to June 8, 1943.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of September 9, 1943, is as follows:

"Act No. 114, Alabama General Laws, Regular Session, 1943, provides in part as follows:

"That after the expiration of the present term of the present incumbents of the office of tax collector, and beginning on the first day of October, 1943, the term of office of all county tax collectors shall be for a period of six years, and they shall hold office until their successors are elected and qualified. ***"

"Title 41, Section 77, Code of Alabama, 1940, provides for tax collectors bond.

"Several of the tax collectors had filed bonds for a four year term before the above referred to Act No. 114 was approved.

"These bonds were either replaced with a six year bond, or with a rider extending the four year bond for a six year period.

"We would like to have your official opinion as to whether this is the legal procedure for the handling of tax collectors bonds, or if the tax

collectors will have to file a four year bond and then file an additional bond for two years, to cover the six year period from October 1, 1943, through September 30, 1949.

"We refer you to Title 41, Section 60 of the Code of Alabama, 1940, which section refers to new bonds for county officers whose terms are extended."

Code 1940, Tit. 41, § 77 provides that the tax collector's bond be conditioned "faithfully to discharge the duties of his office, which are or may be required of him by law during the time he continued (sic) therein, or discharges any of the duties thereof."

It is also provided in said section that "a new bond or bond for an additional amount may be required whenever in the judgment of the comptroller the public welfare demands such action."

You should therefore require that such bonds be conditioned in the words of the statute, as indicated above, i. e., "faithfully to discharge the duties of his office *** during the time he continues therein or discharges any of the duties thereof." When such bonds are so conditioned there can be no question that liability thereunder will be co-extensive with the six-year term of office fixed for tax collectors by Act No. 114, S. 164, approved June 8, 1943. In my opinion you are authorized, and it is your duty to require, that such bonds should be so conditioned.

In my opinion in all cases where prior to June 8, 1943, bonds have been filed covering liability only for a four-year term, you may either require a new bond to be filed to cover the six-year term created by the Act of June 8, 1943, or keep the original bond and demand another bond to cover the extended term, as required by Code 1940, Tit. 41, § 60, or a "rider" may be attached to the original bond extending liability thereunder for the extended term. Execution of the "rider" operates in effect as execution of a new bond.

Without inspection of the particular bonds in question I am unable otherwise than as above stated to indicate the appropriate procedure on your part.

Inasmuch as under § 77, supra, you are authorized, whenever in your judgment the public welfare so demands, to require "a new bond," you may, in my opinion, very properly require such new bonds to be executed and filed, conditioned to cover liability for the six-year term beginning October 1, 1943, as a substitute for bonds filed prior to June 8, 1943, when the extended term was created by Act of Legislature.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 10, 1943.

Hon. Howell Turner,
Secretary of State,
Capitol.

Foreign Corporations—Construction Contracts with Federal Government—Doing Business—Code 1940, Tit. 10, §§ 192-3; Tit. 51, §§ 339, 345, 348.

A foreign corporation under contract with the United States for construction work is not exempt from operation of the Constitution and laws of Alabama requiring foreign corporations to qualify to do business in Alabama by reason of the fact merely that the work done under such contract will be done for the United States Government.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of November 5, 1943, is as follows:

"We have received the following inquiry from a foreign corporation:

"We are commencing the construction of a building for the United States Government at Tuskegee, Alabama. Do the laws of Alabama require that we appoint a statutory agent in your state while we are doing business there as a contractor for the United States Government?"

"Will you please advise if this corporation should qualify in the State of Alabama as a foreign corporation for the transaction of business in pursuance of Title 10, Sections 192 and 193, and Title 51, Sections 339, 345 and 348, Code of Alabama of 1940."

Your inquiry discloses no facts effective to exempt this foreign corporation from the operation of the general rule of law that foreign corporations engaged in doing business in a State other than the domiciliary state must comply with the constitution and statutes of the state wherein such business is done.

"The fact that the construction work engaged in is under a contract with the Federal Government does not necessarily alter the general rule, and this is true, although the work is concerned with construction upon land within the exclusive jurisdiction of Congress, if acts are done or property is occupied outside such reservation in the course of the work for reasons of convenience or necessity. A fortiori, in such a case, the corporation is doing business in the State so as to be subject to the jurisdiction of its courts." 23 Am. Jur. 378, § 380; General Construction Co. v. Fisher, 97 A. L. R. 1252

(Oregon), 295 U. S. 715, 79 L. ed. 1671; *O'Pry Heating & Plumbing Co. v. State*, 241 Ala. 507, 3 So. 2d 316.

I am of opinion that under the facts stated and in the absence of further information as to the execution and terms of the contract between the corporation and the United States, the corporation should qualify to do business in Alabama as provided in the statutes to which you refer.

I find nothing in your statement of facts that would bring the question within the influence of the decision in *O'Pry Heating & Plumbing Co. v. State*, *supra*.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 11, 1943.

Hon. Ralph W. Roberts,

State Registrar,

Bureau of Vital Statistics,

Montgomery, Alabama.

Act No. 118-H-113, Approved June 8, 1943—

Proceedings to establish time and place of Birth and Parentage—

1. Under the aforementioned Act petitioner if *sui juris* may designate an attorney to represent him upon the filing of a petition and hearing thereof to establish time and place of birth within the State of Alabama and his or her parentage; otherwise the petition should be filed in the name of the petitioner by his legal guardian or in default of such guardian by his parent or some other person as next friend.

2. Neither petitioner nor his attorney is required to be a resident of the State when the petition is filed.

3. Unless evidence is offered by petitioner or someone in his behalf at the hearing of said petition in support of its allegations it should be dismissed.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of November 5, 1943, is as follows:

"In proceeding to establish births by judicial declaration under provisions of House Bill 113 (Governor's No. 118) Alabama General Laws, Regular Session 1943, several judges, and others have raised the following questions:

"1. May a petitioner employ or designate someone to represent him?

"2. May a parent, guardian, or other qualified person act in behalf of a minor child?

"3. Must a petitioner, or his agent, be a resident of this state at the time of filing the petition?

"4. If it is necessary for a petitioner or his agent to appear how may the court proceed with the hearing?

"Example, a person now residing in a west coast city has filed his petition in the probate court of the alleged Alabama County of his birth. The petition was executed in the west coast city and was mailed to the probate court. No local agent has been designated to appear at a hearing in the petitioner's behalf. Qualifications in House Bill 113 eliminate the prospect of any substantial documentary proof of the petitioner's allegations.

"Your official opinion is sought in behalf of those persons who are seeking information for their guidance."

Act No. 118 H-113, approved June 8, 1943, provides a statutory proceeding whereby "any person born in this State or in a foreign country of parents who are legal residents of the State at the time of his or her birth," may establish a public record of the time and place of birth and of his or her parentage. The Act requires, among other things, the filing of a petition in the probate court, circuit court, or other court of like jurisdiction, notice thereof to the county solicitor and the State Registrar of Vital Statistics, hearing of the petition upon evidence in the form of oral testimony or by deposition, and entry of an order or decree upon such hearing.

This proceeding is somewhat similar and analogous to the statutory proceeding for removal of the disabilities of non-age, and in exercising jurisdiction the court entertaining the petition exercises a strictly statutory and limited jurisdiction.

For answer to the four above numbered questions, I am of opinion therefore:

1. Petitioner may upon such hearing be represented by an attorney of his own designation, provided petitioner is sui juris; otherwise petitioner should sue by next friend or guardian, in case petitioner is a minor.

2. I find in the Act no express authority whereby a parent, guardian or other person is authorized to file a petition in behalf of a minor child, but I think such authority may be implied upon general principles of law inasmuch as a minor is not empowered in his own name to file a petition or sue in a court of law or equity and must be represented in such proceeding by his legal guardian, or in case he has no legal guardian then by next friend. If the petition is filed by the minor's parent, it should be filed by such parent as next friend or if such parent is legal guardian then by the parent as such guardian.

3. I find nothing in this Act requiring that petitioner or his attorney or representative should be a resident of this state when the petition is filed.

4. I do not understand the purport of the fourth question reading: "If it is unnecessary for a petitioner or his agent to appear how may the court proceed with the hearing?" The only answer I can make to this question is that unless the petitioner or his attorney appears at the hearing, and offers evidence to sustain the allegations of the petition the petition should be dismissed for lack of prosecution. Unless competent legal evidence is offered by someone in behalf of petitioner to sustain the allegations of the petition there is no basis for any order or decree of the court other than an order of dismissal.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 12, 1943.

Hon. E. P. Russell, Director,

Department of Corrections and Institutions,

Capitol.

Fee of County Court—Sheriff's fee cattle rustling—Attorney's fee
—Court Reporter's fee in automatic appeal—

1. Where the Clerk of the Circuit Court acting as Ex Officio clerk of the county court records the affidavits and warrants together with the appearance bonds he should be paid for same at the same rate he is paid for making final records.

2. The \$50.00 fee allowed the sheriff for furnishing proof and bringing about the conviction of any person charged with stealing a horse, mare, gelding, cold, filley, mule, jack, jennet, cow, or animal of the cow kind under Act No. 462, H. 190 can only be paid from the fine and forfeiture fund of the county after return of execution of the defendant marked "no property found."

3. The fee of attorney appointed to defend and the allowance of court reporter in automatic appeal case are paid by the State from its general fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for official opinion bearing date of October 30, 1943, is as follows:

"Following up your opinion of August 28, 1943, to Hon. Howard Kirby, Clerk of Circuit Court, Etowah County, Gadsden, Alabama in regard to payment to the clerk a fee known as final record in county court cost cases, we respectfully ask that you advise us in regard to this fee, that is, is it a legal fee against the department?

"We also ask that you render an opinion as to who should pay the \$50.00 fee to the sheriff, which was created regular session 1943 of Legislature, Act No. 462, House Bill 190, to provide for payment to the sheriff furnishing evidence and bringing about the conviction of any person who steals any horse, mare, gelding, colt, filley, mule, jack, jennet, cow or animal of the cow kind.

"We also respectfully ask your opinion as to what funds the automatic appeal fee as brought out in Act No. 249, House Bill 115, regular session Legislature 1943, should be paid.

"The schedule of fees as shown in Title 45, Section 69, 1940 Code of Alabama, does not make provisions for any of these fees to be paid by the department."

I note you say in your request "following up your opinion of August 28, 1943 to Hon. Howard Kirby, Clerk of the Circuit Court of Etowah County." I am sure that you meant to say, instead of August 28, 1943, October 28, 1943. It is my opinion that the state should pay for what is commonly called a final record in the county court. You will note that Title 45, Section 69, Code of 1940, which section designated the costs the state will pay where a defendant is sentenced to hard labor for the county, or sentenced to the penitentiary, provides among other things:

" *** making final record fifteen cents per hundred words *** "

While the recording of the affidavit, warrant and appearance bond is not strictly speaking a part of the final record, but is making a record of im-

portant papers, I think the clerk should be paid the same for recording these papers as though they were in fact a part of the final record.

Now, as to your second request which is:

"We also ask that you render an opinion as to who should pay the \$50.00 fee to the sheriff, which was created regular session 1943 of Legislature, Act No. 462, House Bill 190, to provide for payment to the sheriff furnishing evidence and bringing about the conviction of any person who steals any horse, mare, gelding, colt, filley, mule, jack, jennett, cow or animal of the cow kind."

You will note the act providing the fee or allowance of \$50.00 to the sheriff for furnishing proof and bringing about the conviction of any person for the theft of certain stock and cattle is Act No. 462, H. 190, approved July 7, 1943, and is as follows:

"To provide for payment to the Sheriff furnishing evidence and bringing about the conviction of any person, who steals any horse, mare, gelding, colt, filley, mule, jack, jennet, cow, or animal of the cow kind.

"Be it Enacted by the Legislature of Alabama:

"Section 1. When any person is convicted of stealing any horse, mare, gelding, colt, filley, mule, jack, jennet, cow, or animal of the cow kind, there shall be charged in the bill of cost the sum of \$50.00, to be allowed the Sheriff who furnished the evidence and brought about the conviction of any person for said violation. The Sheriff so claiming said sum shall satisfy the Presiding Judge that he is entitled to the same, and shall receive from the Judge a certificate to the effect. Provided, however, the total amount to be paid to the Sheriff shall not exceed the total sum of \$50.00 regardless of the number of person convicted as a result of service rendered in connection with obtaining and furnishing evidence pertaining to any one set of facts.

"Section 2. All laws or parts of laws in conflict herewith are hereby expressly repealed.

"Section 3. This Act to become effective upon approval of the Governor or its otherwise becoming a law.

"Approved July 7, 1943."

This Act provides in part, "there shall be charged in the bill of cost the sum of \$50.00 to be allowed the sheriff, etc." The Act, it is true, provides it shall be charged in the bill of cost but fails to state how this item shall be paid. It does not provide it shall be paid as other costs are paid by the State under Title 45, Section 69, supra, nor was Section 69, supra, amended so as to include this item. Therefore, the State cannot pay it, nor can the county pay the same from its general fund. The only way I see it can be paid is by execution against the defendant, and if such execution is returned "no property found," then out of the county fine and forfeiture fund under Title 15, Section 393, Code of 1940.

Now, we come to the third request which is:

"We also respectfully ask your opinion as to what funds the automatic appeal fee as brought out in Act No. 249, House Bill 115, regular session Legislature 1943, should be paid."

I call your attention to Act No. 249, H. 115, approved June 24, 1943, and especially to Sections 11 and 12 of said Act, which are as follows:

"Section 11. Legal counsel appointed to prosecute the appeal shall be paid by the State of Alabama a sum not in excess of \$250.00 to be determined and fixed by the Chief Justice of the Supreme Court of Alabama, who shall certify to the State Comptroller the name of the legal counsel and the amount to be paid. The Comptroller shall thereupon draw a warrant on the State treasury, payable to said legal counsel, for the amount so certified.

"Section 12. The Clerk of the Circuit Court shall, within a reasonable time after the court reporter notifies him that he has finished and delivered to the indigent appellant's legal counsel a transcript of the testimony and other proceedings which he was ordered to transcribe, ascertain the lawful fees earned by the court reporter in transcribing the testimony and other proceedings which he was ordered so to do, together with lawful fees for furnishing copies thereof as provided by law or ordered so to do, and shall certify the name of the court reporter and the amount to the State Comptroller, who shall forthwith issue a warrant, drawn on the State treasury, payable to the court reporter in the sum so certified."

You will observe both the fee of the attorney appointed to defend and the allowances of the court reporter for transcribing the testimony are paid from the "State treasury," which means from the general fund. **Weaver vs. Tidwell**, 228 Ala. 169, 153 So. 218.

You are therefore advised that the fees growing out of Act No. 249 supra, are not payable out of the funds of your department, but on the contrary, are payable out of the general funds of the State.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 12, 1943.

Hon. William A. Conrad,

Clerk Circuit Court,

Mobile, Alabama.

Code 1940, Title 7, Section 72—Appeals by the State or its agents or agencies—Department of Industrial Relations—

The Director of the Department of Industrial Relations is entitled without giving security for costs or executing supersedeas bond to appeal from a judgment rendered against him as such director provided such judgment will be payable out of State public funds in the event it should be affirmed.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of November 3, 1943, is as follows:

"In re: Alabama Dry Dock and Shipbuilding Company, a corporation, Plaintiff—vs. Frank R. Broadway, as Director of the Department of Industrial Relations of the State of Alabama, Defendant, No. 1533.

"On today, November 3, 1943, the Circuit Court of Mobile County, Alabama, rendered judgment against said above named defendant, Frank R. Broadway, As Director of the Department of Industrial Relations of the State of Alabama, in favor of the above named plaintiff, Alabama Dry Dock and Shipbuilding Company, a corporation, for the sum of \$106,-299.84 together with costs of court.

"I, therefore, respectfully request your Honor's official opinion on the following questions, viz:

"1. If above named defendant should desire to appeal from said judgment, would or not said above named defendant be required to give either a Supersedeas Bond or Security for costs of appeal?

"2. If said judgment should be affirmed, would or not said above named defendant be liable for costs of court, and my duty to issue execution for same?"

In *Alabama Girls Industrial School v. Reynolds*, 143 Ala. 579, 42 So. 114, on page 583, it is said:

" *** In other words, if the complainant is a mere State agency—a representative of the State instituted and maintained by the sovereignty

for the exercise of a governmental function,—a suit against it is a suit against the State, just as much so as the action of *Comer v. Bankhead*, reported in 70 Ala. 493; and *Smith v. Reeves* (178 U. S. 436), where the relief sought was against the defendant 'As treasurer of the State of California' to recover money paid to him as such officer. In that case the court said: 'Although the State, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against that officer in his official capacity, and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint.'

For the purposes of this opinion, in the absence of any showing to the contrary, it is assumed that the judgment above referred to, rendered November 3, 1943, against the defendant "as Director of the Department of Industrial Relations of the State of Alabama," is in substance and effect upon the principle above stated a judgment against the State of Alabama in that it will have to be paid, if at all, out of State public funds.

Premitting the question, whether or not upon appeal the appellate court might not of its own motion be authorized to dismiss the appeal or to set the judgment aside it is my opinion that any appeal therefrom comes within the provisions of Code 1940, Title 7, Section 72, wherein among other things it is provided that the State "is entitled to all remedies provided for the enforcement of rights between individuals, without giving bond or security or causing affidavit to be made, though the same may be required as (sic) if the action were between private citizens ***."

As I see it the State or its agencies or agent or other public officer, if such agent or public officer be sued in his official capacity, is entitled to the benefit of this statute and to the well-established right of appeal from any judgment affecting the rights of the State, without giving security for costs of appeal or executing a supersedeas bond in connection therewith.

It is unnecessary to answer your question numbered 2 at this time. Answer thereto, in my opinion, should be deferred pending the final outcome of this case.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 15, 1943.

Hon. John S. Pollard,

Tax Assessor,

Dallas County,

Selma, Alabama.

Tax Assessor — Salary — Commissions — Assessment of Motor Vehicles—

Where tax assessor was compensated by commissions during the tax year beginning Oct. 1, 1942, and was re-elected for the term of office beginning Oct. 1, 1943, at which time his compensation became payable by salary, he was not entitled to commissions with respect to assessment of motor vehicles after October 1, 1943, based upon the value of such vehicles as of Oct. 1, 1942 or during the tax year 1942-43, or 1943.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of November 10, 1943, is as follows:

"I was re-elected Tax Assessor of Dallas County on November 3, 1942, for the term beginning October 1, 1943. Under Constitutional Amendment XLVI submitted November 5, 1940, and proclaimed ratified November 15, 1940, I was placed on a salary basis. This amendment did not affect the basis of my compensation until the beginning of my present term on October 1, 1943.

"On October 1, 1943, I began the assessment of motor vehicles for ad valorem taxes, the value of said motor vehicles for the purpose of assessment being the value as of October 1, 1942. These assessments are for ad valorem taxes for the tax year commencing October 1, 1942, and ending September 30, 1943.

"As these assessments are for the tax year 1942-43, and I did not go on a salary basis until October 1, 1943, please give me your official opinion as to whether or not I am entitled to collect commissions on such assessments."

I am of opinion there is no basis for any claim on your part with respect to assessment of motor vehicles other than the salary attaching to your office beginning October 1, 1943, by reason of the fact that such assessments are based on the value of such vehicles as of October 1, 1942, the beginning of the tax year 1942-43, or 1943, as it is sometimes called, during which time the tax assessor's compensation was measured by the amount of taxes assessed and was paid in the form of commissions.

Had you not been re-elected for the term beginning October 1, 1943, it could hardly be contended that your successor, in addition to the salary then fixed for his services, would also be entitled to commissions with respect to assessments of motor vehicles because such assessments were based on values as of October 1, 1942, nor would you be entitled to commissions on such assessments, although admittedly they were for 1942-43, or 1943, ad valorem taxes. The fact of your re-election places you in no better position than that of your successor to office if you had not been re-elected.

The duties, terms and compensation, in whatever form, whether fee, salary or commissions, of public officers are fixed by law, that is to say by the legislature, and the incumbents of such offices take them cum onere and can look only to express provisions of law for compensation, whatever the quantity or quality of service may be, and however inadequate such compensation may be. The earmark of a salary is fixed compensation, payable periodically, **depending upon the time when the services are rendered**, and not upon the amount or value of such services. 43 Am. Jur. p. 147, § 357. Compensation, whether by salary, fees or commissions, is not subject to equitable construction or discretionary action on the part of public officials, if definitely fixed by law. *United States v. Van Duzee*, 185 U. S. 278, 46 L. ed. 909.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 20, 1943.

Hon. W. Emmett Brooks, Director,
Department of Labor,
Montgomery, Alabama.

**ACT NO. 298 TO CREATE A DEPARTMENT OF LABOR OF
THE STATE OF ALABAMA.**

1. Section 8 of the Act guaranteeing freedom of the employee to contract individually is not in conflict with any constitutional provisions, State or Federal, and is valid.
2. The National Labor Relations Act is based upon the Commerce Clause of the United States Constitution.
3. The State enactment relates to intrastate commerce and the police power of the State to regulate local matters.
4. The National Labor Relations Act has no control over the Bradford Act and operates over a different field of legislation.

5. Under the Alabama law the union labor organization is forbidden to require provisions in contracts that prospective employees must join and continue to belong to the labor union entering into such contract and such a contract entered into between the union and the employer is in violation of the Alabama Act and the Constitutions of the United States and the State of Alabama.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of October 5, 1943, is as follows:

"Will you kindly advise me if that part of a labor agreement between a union and an employer which contains the following paragraph would be in violation of Section 8 of Act No. 298 of the Legislature of Alabama of 1943 (Bradford Act): 'New employees hired shall, as a condition of employment, join one of the signatory Unions within 90 days from the beginning of his or her employment, and thereafter remain a member of said Union in good standing.'

"As this question has been raised and involves one of the large manufacturing establishments of Alabama, I will appreciate it if you can give it your preferred attention."

Since receiving the foregoing letter the office is in receipt of your letter of November 3, calling attention to Section 8(3) of the National Labor Relations Act of July 1935. The provisions to which you refer are in U. S. C. A., Title 29, Section 158, Subdivision 3, and are in the following language:

" *** That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sections 151-166 of this title as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made."

Looking beyond the surface the concrete question you want answered is, Did the State of Alabama have authority to pass Section 8 in this labor legislation, known as the Bradford Act. In order to make a correct answer to this question we deem it proper, if not necessary, to set forth a restatement of some fundamental and well-established principles of government and law.

SOVEREIGNTY

Under our system of government the people are the sovereign. They have the power to choose such form or plan of government as they deem proper. On this theory sovereignty itself is not subject to law for it is the author of and source of all law. In this country the people—sovereignty—established a

representative form of government for the several states. The people of the original thirteen states created the government of the United States by the adoption of the Federal Constitution, and by that instrument delegated to the Federal Government named powers. This constitution marked the boundaries of the authority and power of the Federal Government. The state governments thereby released their sovereignty and power over the matters delegated to the general government. After the adoption of the United States Constitution other states became members of the Union and by the terms of their admission accepted and became bound by the Federal Constitution. The people adopted constitutions creating states of a representative character. These constitutions fixed certain limitations on the states' representatives.

As applied to the legislative department of the state it is vested with all the power of the sovereignty except as limited by the State and Federal Constitutions. Under this theory the legislature may enact any law, wise or unwise. This principle is permanently embedded in our governmental philosophy and our jurisprudence. This principle is so well established and understood that extensive citation of authority is unnecessary. **Dorman v. State**, 34 Ala. 216, **First Tiedeman, State and Federal Control of Persons and Property**, pages 14 et sequi; **First Cooley, Constitutional Limitations, Eighth Edition**, pages 3-25, 81-96, and notes.

If the legislature in enacting laws is without restraint except by the provisions of the State and Federal Constitutions, it becomes necessary to examine the constitutional provisions touching upon the question under consideration. The only provisions of the Federal Constitution that appear to be in any degree applicable to the question under review are what is known as the "Commerce Clause" and Section 1 of the Fourteenth Amendment to the United States Constitution. The "Commerce Clause" is as follows:

"To regulate commerce with foreign nations and among the several states and with the Indian tribes." Constitution, U. S., Article 1, Section 8 (U. S. C. A., Section 8(3), page 138.)

This clause by express language confers on Congress only power to legislate on foreign commerce and commerce between the states and delegates to the Congress no authority over commerce wholly within the state and not interwoven with interstate commerce. This is the universal holding of the Supreme Court of the United States as well as state courts. **State Tonnage Tax Cases**, 12 Wall. 214; **Veazie v. Moore**, 14 How. 573, 14 L. Ed. 545; **Duke Power Co. v. Greenwood Co.**, 302 U. S. 485, 82 L. Ed. 381; **Labor Board v. Jones and McLaughlin**, 301 U. S. 1, 29-30.

Much litigation has arisen as to when such action interferes with and burdens interstate commerce under this clause, and there are instances where the legislature has undertaken to regulate local commerce that has been held to be so closely and intimately connected with interstate commerce that it constituted a burden thereon and the enactment declared forbidden by the "Commerce Clause" of the Federal Constitution.

However, it is the settled law that there must be a reasonable and direct interference with the operation of interstate commerce and that an indirect, remote or incidental burden or interference will not authorize the striking

down of state legislation, merely regulating intrastate commerce. **Bayside Fish Flour Co. v. Gentry**, 297 U. S. 422; **Labor Board v. Jones and Laughlin**, 301 U. S. 1, 37.

State legislation on the subject should not be foreclosed unless the enactment complained of so affects interstate commerce that it should be prevented. **Allen Bradley Local v. Board**, 315 U. S. 740, 748. This case also holds that the court will not assume in advance that a state court will so construe its law as to bring it into conflict with the Federal Constitution and Acts of Congress (page 746).

The court in this case further holds that in order to strike down a state statute it is not sufficient that the state act might be so construed and applied as to dilute, impair or defeat the rights guaranteed by the Constitution, and neither is it sufficient to show that other parts of the statute are incompatible with the Federal law (page 750).

The United States Supreme Court in construing state legislation has laid down the rule that the cardinal principle is to save an Act, not to destroy it. **Labor Board v. Jones and Laughlin**, 301 U. S. 1, 30.

DUE PROCESS CLAUSE

The next proposition to consider is, Does Section 8 of the Bradford Act violate the due process clause of the Federal Constitution?

The Fifth and Fourteenth Amendments to the United States Constitution contain similar provisions. The Fifth provides that no person shall be deprived of life, liberty, or property without due process of law. Under the universal decisions of the Supreme Court this amendment is not directed to individuals or states but solely to process by the Federal Government. That eliminates it from consideration in this opinion.

The Fourteenth Amendment, by its plain language, is directed against state action. It reads as follows:

"No state shall deprive any person of life, liberty or property without due process of law."

The courts are agreed that these terms are broad enough to and do include state action through its lawfully constituted officers in the administration of the state law. This is so well settled we will not stop to cite authorities.

A very great volume of state laws have been haled into the Federal Courts on the alleged grounds that they offend this clause of the Constitution. The roots of this due process clause reach back to very ancient history in the English law. Through the judicial course of this coveted provision some cardinal principles have been immutably established, some of which we deem applicable will be noticed.

The Supreme Court of the United States has held that the Fifth and

Fourteenth Amendments are not a guaranty of untrammelled freedom of action and of contract, that in the exercise of its power of regulating commerce Congress can subject both amendments to restraints not shown to be unreasonable. **Va. Ry. v. Federation**, 300 U. S. 515, 558.

It has been said on very high authority that this clause of the Constitution was intended to secure individuals from the arbitrary exercise of the powers of government. **Second Cooley, Constitutional Limitations**, Eighth Edition, page 739; **Bank of Columbia v. Okely**, 4 Wheat. 235, 244.

Liberty, as used in this constitutional clause, denotes not merely freedom from bodily restraint but mental restraint, covering the right of the individual to contract, to engage in any of the common occupations of life, to establish a home, to worship God according to the dictates of his own conscience, and to enjoy the privileges essential to the orderly pursuit of happiness of free men. **Second Cooley, Constitutional Limitations**, Eighth Edition, page 824.

Another distinguished law writer expressed himself on this point in substance as follows: The idea that one man may be compelled to hold the life or the means of living or any other valuable right essential to the enjoyment of life is intolerable in any country where freedom prevails. **Tiedeman, On State and Federal Control of Persons and Property**, pages 14-15. This same author says further on this same question that one's liberty is infringed if his liberty to make reasonable contracts is taken away by unreasonable regulations. (Page 295.) These authorities are but stating the deliberate conclusions of the courts of the country.

On this subject the Supreme Court of the United States has said that freedom from interference plainly means pressure, that use of authority or power to induce action upon the part of an employer. **Tex. and N. O. R. Co. v. Railway Clerks**, 281 U. S. 568. There can be no substantial equality between the man who has not wherewith to provide himself with food and shelter and who is able to put the former into a position to earn his food and shelter. **First Tiedeman, On State and Federal Control of Persons and Property**, page 315. This principle is further elaborated upon and firmly established by the Supreme Court of the United States in **West Coast Hotel Co. v. Parrish**, 300 U. S. 379, 393-4.

The Court in this case says:

"What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." (Page 391.)

The Court further said:

" *** The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." (Page 392.)

Continuing the Court said:

" *** In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression." (Page 393.)

This case deals with many of the principles under review by us.

The legislature in enacting the Bradford Law was clearly acting under its police power, which in a comprehensive sense embraces its whole system of internal regulation by which the State seeks not only to preserve the public order but also to establish and protect the intercourse of its citizens. **Second Cooley, Constitutional Limitations**, Eighth Edition, page 1223. It is true this power is subject to the limitations imposed by Federal and state constitutions, and it will not be allowed to invade or impair the fundamental liberties guaranteed by the Constitutions to the citizens. **Second Cooley, Constitutional Limitations**, Eighth Edition, page 1229. However, a large discretion is vested in the legislature to determine not only what the interest of the public required but the measures necessary for the protection of such interest. **Second Cooley, Constitutional Limitations**, page 1231. This statement is in entire harmony with the great volume of decisions announcing the same principle. The Supreme Court of the United States, in passing on this question, said:

"Neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed the police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and property."

And further that except as to limit by the constitutional provisions the authority of the state is supreme. **St. Louis Etc. R. Co. v. Paul**, 173 U. S. 404; See **Second Cooley, Constitutional Limitations**, page 1235-6 and 1232.

The Supreme Court of the United States has applied these principles to state regulations against picketing a business that is not directly interested in the labor dispute. **Carpenter's Union v. Ritter's Cafe**, 315 U. S. 722.

With these general principles set forth, we fear in tiresome detail, we will examine the provisions of the National Labor Act and Section 8 of the Bradford Act. The National Labor Relations Act affirmatively shows that the Congress founded the act on the "Commerce Clause" of the Federal Consti-

tution. See Section 151 and Section 152(b) of the Act of Congress under discussion. The Supreme Court in construing the Act has declared that the Act was not intended to preclude a state from enacting legislation limited to the prohibition or regulation of the relations of employer and employee pertaining to local matters. **Allen Bradley Local v. Board**, 315 U. S. 740, 748-9.

In further construing this Act the Supreme Court has held that the design of the statute is to secure settlements of labor disputes by collective bargaining with the true representatives of the employer and preventing of such bargaining with any who do not represent the employees. That the Act aims at dealing with the unions through representatives duly selected and that the Act does not preclude **such individual contract as the employer may elect to make directly with individual employees**. **Va. Ry. v. Federation**, 300 U. S. 515, 548-9, 557 and 559; **Labor Board v. Jones and Laughlin**, 301 U. S. pages 1, 45.

The Supreme Court has held that an intention of Congress to exclude states from asserting their police power must be clearly manifested. **Allen Bradley Local v. Board**, 315 U. S. 740, 747.

Manifestly the National Labor Relations Act operates only in the field of interstate commerce, and the Bradford Act clearly shows it is only undertaking to deal with matters concerning solely intrastate commerce, and to remove any doubt the Act exempts all matters falling within the scope of the National Act. See Section 2 of the State Act. Each Act has a clear and distinct field of action and no interference with the legislation of either. As we have shown, it is not a valid objection that in the administration of the law cases might arise where there could be a conflict.

The next question is, Does the due process clause of the Federal or State Constitution invalidate Section 8 of the Bradford Act? In arriving at the purpose and scope of the Act we may have recourse to conditions existing in the country, and the matters engaging the thought and discussions of the people and the press at the time of the passage of the statute. This principle is so well recognized that a citation of authority is not necessary. It is common knowledge that at the time of the passage of this Act the country was very much perturbed over the disputes, shut-downs, strikes, and contract relations of employers and employees. The public press teemed with discussions warning the public of the impending danger of serious results to the public safety of the country. One of the outstanding disputes between employers and employees was the right of organized labor to make contracts for employees with the employer, and the insistence of organized labor that the employers be forbidden to contract with individual employees. It is apparent from the title to the Act that it is its purpose to legislate on some of these questions that were in the public mind. The title says that one of the purposes was "to regulate the activities and affairs of labor organizations" and "to make unlawful interference with a right to work."

Significantly, in defining labor disputes in Section 2(b) of the Act, it provides "that this definition shall not relate to a dispute between an individual worker and his employer."

Section 13 of the Act expressly preserves the right of the individual to

work. From these provisions it is manifest that the intention of the enactment was to make secure the constitutional right of the individual to work and make contract therefor and to exclude organized labor from participation in making the contract or from having any control over such contract or the disputes arising between such employers and employees with reference thereto. Section 8 of the Act gives added force to these logical conclusions. This Section provides that each person shall be free to join or refrain from joining any labor organization and that in the exercise of such freedom he shall be free from interference by force, coercion or intimidation. Standing alone these provisions may be construed as a simple legislative declaration of a constitutional right but when considered in connection with the quotations from the title to the act and the provisions of the Act itself, above pointed out, it speaks in convincing terms that the individual employee shall be free to make his own contract, free from intermeddling from any one else or any organized labor union or association of persons.

Your letter quotes a provision of a contract or proposed contract as follows: "New employees hired, shall as a condition of employment, join one of the signatory unions, within ninety days from the beginning of his or her employment and thereafter **remain a member of said union in good standing.**" (*Italics Supplied.*) It cannot be denied that this language clearly shows that a union labor organization or association has made or proposes to make a contract with an employer which denies the right of an individual thereafter seeking to work or contract to work his constitutional right to work or contract therefor. It is true Section 8 says the interference must be by force, coercion, or intimidation. The authorities cited in the opinion on liberty and freedom of persons and of contract, especially **First Tiedeman On State and Federal Control of Persons and Property**, page 315; **West Coast Hospital Co. v. Parrish**, 300 U. S. Page 379, 393-4; and **Tex. and N. O. R. Co. v. Railway Clerks**, 281 U. S. 568, forcibly show that such provisions as are sought to be incorporated in the contract here under consideration are violative of the Fourteenth Amendment.

Under the authorities cited in this opinion it cannot be doubted that the State had a right to regulate intrastate commerce, and had authority to adopt such reasonable methods, not in conflict with the Constitution, as it deemed proper, and that great consideration must be given to its discretion. Clearly the legislature intended to deal with the relation between all employers and employees engaged in intrastate commerce, or the relations between employer and employee falling within its police powers. It, therefore, had authority to secure to the employee freedom of contract. It may be that causes may arise where the local commerce is so directly connected with interstate commerce that it constitutes a direct burden on the latter, but under all the authorities, this furnishes no grounds for striking down the enactment.

From the foregoing we conclude:

1. That Section 8 of the Bradford Act is not in conflict with any constitutional provisions, State or Federal, and is valid.
2. That the National Labor Relations Act is based solely on the "Commerce Clause" of the United States Constitution.

3. That the Bradford Act relates to intrastate commerce and the police power of the State to regulate local matters.

4. That the National Labor Relations Act has no control over the Bradford Act.

5. That the Union Labor Organization is forbidden under the Bradford Act from requiring provisions in contracts that prospective employees must join and continue to belong to the Labor Union entering into such contract and that any such contract entered into between the union and the employer is in violation of the Act and the Constitution of the United States and the State of Alabama.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 22, 1943.

Hon. Ben P. Singleton,
Chief Examiner of Public Accounts,
Department of Finance,
Montgomery, Alabama.

Walker County—Court of County Commissioners—Act No. 232,
Local Acts of Alabama 1935, p. 131.

Act No. 232, Local Acts of Alabama 1935, p. 131, providing that minutes of the Board of Revenue of Walker County be recorded, is mandatory and must be complied with.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for official opinion, bearing date of November 15, 1943 is as follows:

"Please refer to Act 232, page 131, Local Acts of 1935, and advise me as to whether or not it is mandatory that the Minutes of the Board of Revenue of Walker County be recorded in the office of the Judge of Probate of Walker County.

"I am enclosing herewith, for such help as it may be to you, information from the Examiners now auditing the records of the Board of

Revenue of Walker County, said information pertaining to the above matter."

It is my opinion that your inquiry should be answered in the affirmative.

Act No. 232, Local Acts of Alabama, 1935, page 131, the statute creating the Board of Revenue of Walker County, Alabama, provides in Section 4 thereof as follows:

"That the Probate Judge shall not be a member of the Board of Revenue, no ex-officio member thereof, nor exercise any power, authority or jurisdiction or perform any of the duties of said Board of Revenue, except that the minutes of said Board of Revenue shall be recorded in the office of the Probate Judge and all other papers so recorded that are now required to be recorded for the County Commission, and for such service the Probate Judge shall receive the same compensation that he now receives for like services for the County Commission, and shall be paid in the same manner."

By the terms of the above quoted Section 4, it unequivocally appears that the Legislature has required the recordation of the minutes of the said Board of Revenue in the office of the Probate Judge.

In the case of **Fountain v. Stone**, 211 Ala. 586, 100 So. 892, it was held that a similar provision of the general law, found in Title 12, Section 19, Code of 1940, was mandatory and must be complied with.

Although the said Act No. 232 does not authorize the payment of any compensation to the Probate Judge for keeping the minutes of the said Board of Revenue, he is entitled to a recording fee of fifteen cents per hundred words, under the provisions of Title 11, Section 29, Code of 1940.

It is my opinion that the minutes of the Board of Revenue of Walker County must be recorded in the office of the Judge of Probate of Walker County.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 29, 1943.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Probate Judge not entitled to fee for noting change of ownership of automobiles.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of November 17, 1943 is as follows:

"Every few days we are requested to transfer the license plates on an automobile from the person who originally bought them to someone who has subsequently purchased the car. I do not find in the law anywhere where we are entitled to a fee for making this transfer.

"As you know this office went on a salary basis on October 1, 1943, I am very anxious for an opinion on this matter, for if I should fail to make the charge then it would be charged against me, but I do not want to make a charge for any service rendered for which I am not entitled to a fee.

"Will you please give me your official opinion as to whether or not we are entitled to a fee and should make a charge for this service."

In my opinion, a Probate Judge is not entitled to any fee for noting new or successive owners of motor vehicles upon his license record and reporting such change in ownership to the Department of Revenue.

"The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law. *** " Title 11, Section 1, Code of 1940. *Mobile County v. Williams*, 180 Ala. 639, 61 So. 963; *Troup v. Morgan County*, 109 Ala. 162, 19 So. 503.

I find no statutory authorization whereby any fee may be charged for such service and in the absence thereof hold that no fee can be charged.

Title 51, Section 706, Code of 1940, imposes on both the old and successive owners of motor vehicles the duty to report the change of ownership to the Probate Judge. It further provides that the Probate Judge must note such change on his license record and report same to the Department of Revenue, said Section reading pertinently as follows:

"§ 706. *** ,—(a) When proper motor vehicle license tags have been bought for the current tax year for a motor vehicle and such motor vehicle shall have been sold or transferred to a new owner or to new owners, either once or successively, such motor vehicle license tags shall remain on such motor vehicle in the hands of the new owner or successive owners for the balance of the tax year, and **no new or other license tags need be taken out for the operation of such motor vehicle until the beginning of the next tax year.** Provided, each and every change of ownership of such automobile, or other motor vehicle, and the name and address of the new or successive owner are noted by the probate judge on his record of the license and reported by him within ten days after such change in ownership is reported to him to the department of revenue, and it shall be the duty of the old and new and successive owners to report such change in ownership to the probate judge within five days from such change in ownership. *** Any person failing to perform the duty required of him by the provisions of this section shall be guilty of a misdemeanor, *** " (Underscoring supplied.)

The Department of Revenue has furnished the various Probate Judges certain forms entitled "**TRANSFER OF MOTOR VEHICLE LICENSES**" to facilitate the performance of their duties which, no doubt, contributed to a general misunderstanding of the application of the statute. Strictly speaking, the statute does not provide for the transfer of the automobile license from one person to another, instead it provides that the license tag must remain with the automobile and that the new or successive owner or owners are relieved from the necessity of purchasing a new license.

The license tax levied on motor vehicles contemplates that the owner pays for the use of the highways and aside from certain police features, the scheme of license taxes is essentially a revenue measure. *Williams v. Albany*, 216 Ala. 408, 113 So. 257. Once the owner of a motor vehicle has purchased proper license tags, his automobile may be operated on the highways of this state by anyone so authorized, his son, wife or friend, for example. The privilege or license to operate such a motor vehicle upon the highways is extended not only to the owner but also to such son, wife, or friend. Obviously they cannot be required to purchase license tags merely for such privilege. The cited Code Section does not provide for the transfer of the license but merely authorizes the new or successive owner or owners to operate the motor vehicle until the beginning of the next tax year without being required to purchase new or other license tags; it subjects the old owner, the new or successive owner or owners and the Probate Judge, to criminal prosecution for failure to perform the duties required therein, but nowhere does it provide for the "transfer of a license" or for any fee for the services the Probate Judge is required to render. Also see Vol. 31, Quarterly Report of the Attorney General, page 60; 1936-38 Biennial Report of the Attorney General, page 271.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 29, 1943.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Counties—Court of County Commissioners—Torts—

1. In the absence of statute, a county is not liable for the tortious acts of its officers, agents, servants and employees.
2. Unless authorized by statute, the Court of County Commissioners has no authority to expend county funds for the payment of a claim for damages incurred through the negligence of one of the employees of the county.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for official opinion bearing date of November 6, 1943 is as follows:

"An unfortunate accident recently occurred in this County being a collision between a truck, owned by the County, and an automobile driven by a private citizen. The truck owned by the County was one being used by the County in the upkeep of public roads in one of the districts and the driver thereof was under the direct supervision of the County Commissioner of that district. The private citizen was in an automobile on one of the main roads of the County and traveling in a southerly direction, while the truck owned by the County was traveling on a lateral road going in a westerly direction. It is thus seen that as the drivers of the two vehicles approached the intersection of these two roads at the same time, the private citizen was to the truck driver's right. The view of both parties as they approached the intersection was partially obstructed so that neither had a clear unobstructed view of the approach of the other. The collision took place at the intersection, and considerable damage was done to the automobile of the private citizen.

"Assuming, for the purpose of determining liability of the County for the damage done, that an investigation would show that there was negligence on the part of the driver of the County's truck and that there would be liability for this negligence otherwise than as hereinafter stated, I would like to have your opinion on the following questions:

- "1. The case of *Moore vs Walker County*, 236 Ala. 688, 185 Sou. 175, would indicate that the County being engaged in the exercise of a governmental power in operating the truck, would not be subject to suit for the damage and is immune from such suit to compel the payment of

damages. Does the principle announced in that case apply here and could the County be compelled to pay the damages?

"II. Even though the above question should be answered in the negative, nevertheless if after investigation, the Court of County Commissioners should determine that save for the above and foregoing the County would be liable, can the County legally waive its immunity from suit and liability and pay damages in such sort that the officials paying such claim would not have the money paid out charged back to them by the examiner?"

In answer to the first question presented by your inquiry, I wish to advise you that the principles announced in the case of **Moore v. Walker County**, 236 Ala. 688, 185 So. 175, are applicable to the situation presented in the instant case, and the County cannot be compelled to pay for damages sustained by the automobile.

In an opinion rendered by this office to the Judge of Probate of Jackson County under date of April 4, 1929, it was held that the County was not authorized to pay a claim for damages arising out of an accident in which a person was killed by a County truck. **Biennial Report of the Attorney General, 1928-1930**, page 265. The following statement and list of authorities are found in this opinion:

"The general rule of law that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another is injured, is not applied to counties except where there is a statute imposing liability for the tortious acts of its officers, agents, servants and employees.

"15 Corpus Juris, p. 570.

"Counties are not liable for the neglect of their officers to perform a corporate duty unless such a right is given by statute. There is nothing in our general statutes which subjects the county to such a liability, and the general law must prevail.

"**Hamilton v. Jefferson County**, 96 So. 628;

Jones v. Jefferson County, 206 Ala. 13;

Heigel v. Wichita County, 84 Texas 392;

Dowling v. Mason County, 87 Kentucky 208."

In answer to your second question, it is my opinion that the County cannot legally pay for the damages sustained by the automobile.

The Court of County Commissioners of Elmore County was created by Statute, and only has such powers as were conferred on it by statute. It can expend public funds only when expressly authorized by law. I can find no provision of law which authorizes the expenditure of county funds for dam-

ages incurred through the negligence of one of the employees of the county. See **Woodruff v. Beeland**, 220 Ala. 652, 127 So. 235.

See also Biennial Report of the Attorney General, 1936-1938, page 427, and Quarterly Report of the Attorney General, Volume 15, page 219.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 30, 1943.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Probate Judges cannot commence selling motor vehicle tags on a declining monthly basis until after November 15th.

Automobile operated on highways of Alabama after September 30, 1943, is subject to imposition of 1944 license.

Owner of automobile operated on highways of Alabama after September 30, 1943, for which no 1944 license was procured prior to November 16, 1943, is subject to citation.

Owner of automobile operated on highways of Alabama after September 30, 1943, and for which no 1944 license was procured prior to November 16, 1943 must be charged statutory penalty by Probate Judge prior to issuance of 1944 license.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of November 17, 1943, is as follows:

"Under Title 51 Section 710 Code of 1940, all motor vehicle licenses become due on the 15th day of November each year and delinquent after that date.

"House Bill 507 1943 Acts of the Legislature amended Section 710

Title 51—1940 Code to read, as follows:

“‘All motor vehicle licenses under this article Shall become due on the first day of October each year and delinquent on November 16, next thereafter.’

“The receipts which we gave to the purchasers of automobile licenses for 1943 stated on the receipt that automobile license tax had been paid for tax year ending November 14, 1943.

“The receipt which we gave purchasers of licenses for 1944, states on the receipt that it is for automobile license tax year ending September 30, 1944.

“Some confusion has arisen in the office as to the date when we may sell automobile license plates on a monthly declining basis, and also as to the date the 1943 licenses become delinquent, therefore will you give me your official opinion on the following:

“‘In your opinion if a man who had a license for 1943 on his automobile and drove his car up to and through the 14th of November and put it up and then applied for a 1944 license plate after the 14th of November and made affidavit that he had not driven the car since the 14th of November, should we charge a penalty on this license since he did drive the car after the first of October up until the 14th of November.’

“Will you also give me your official opinion as to the date we may begin selling automobile licenses on a declining monthly basis. Since the law as amended recites that automobile licenses become due October 1st, but the law as set out in the 1940 Code says they are delinquent after the 16th of November, should we sell on a declining basis beginning on November 1st, or wait until December 15th to sell on a declining monthly basis.

“In other words, would the due date as set out in Title 51 Section 110 of the Code of Alabama 1940 control, or would the due date as set out in the 1943 Act of the Legislature control.

“Of course, the last question stated would only apply where motorists had acquired an automobile during the period from September 30, to November 14, 1943, as I take the position that if he owned the car on the 15th of November he would have to purchase either a full year or half year and would not be entitled to a tag on the declining monthly basis.

“We have a number of war industries which are continually changing employees, and your prompt reply to this request will be appreciated.”

Please permit me to trace the legislative history of Act No. 576, 1943 Legislature, insofar as such history is applicable. Schedule 158.17 of Section 348, Chapter 6, of Article XIII of an Act entitled, “An act to provide for the

General Revenue of the State of Alabama" (Acts of 1935, page 527) reads as follows:

"Schedule 158.17. All motor vehicle licenses under this Act shall become due on October 1st of each year and delinquent on November 15th thereafter."

The provisions of this schedule were amended by an Act, approved August 8, 1939 (Acts of 1939, page 364), to read as follows:

"Schedule 158.17. All motor vehicle licenses under this Act shall become due on the 15th day of November of each year, and delinquent after that date; but they shall be issued on application at any time within 45 days prior to that date."

The provisions of the amended schedule were brought forward into the Code of 1940 as Title 51, Section 710, without material change.

By an Act approved July 10, 1943, the Legislature amended this Code Section to read as follows:

"All motor vehicle licenses under this article shall become due on the first day of October of each year, and delinquent on November 16 (sixteenth) next thereafter.

"Section 2. This act shall become effective on and after October 1, 1943."

It will be observed from the foregoing that this Code Section is now exactly the same as the provisions contained in the Act to provide for the General Revenue of the State of Alabama (1935 Acts) with the single exception that the delinquent date is now November 16th instead of November 15th, as provided in the 1935 Act.

It is my opinion that any motor vehicle operated upon the highways of the State of Alabama between October 1, 1943, and November 15, 1943, inclusive, is subject to the imposition of 1944 license; that the owner of such vehicle may have purchased such a license through November 15, 1943, without payment of any penalty, and that the Probate Judges must charge the statutory penalty before issuing a 1944 license, where such is purchased after November 15, 1943. It is further my opinion that where the owner of such vehicle operated same upon the highways of this State after September 30, 1943, and stored same prior to November 16, 1943, he is subject to citation for not purchasing a 1944 license. Needless to say, where the automobile was not operated upon the highways after September 30, 1943, the owner is not subject to either citation or the statutory penalty.

Bearing in mind the one day difference in the delinquency date of the present statute and the law as existing under the above cited 1935 Acts, the above opinion is a brief restatement of a part of the decision of the Supreme Court in the case of **Henry, Commissioner of Licenses of Jefferson County v. Drennen Motor Car Company**, 235 Ala. 559, 180 So. 563.

It is also my opinion that you may commence selling licenses for automobiles on a "declining monthly basis" at any time after November 15, and that your estimate should be made on the basis of the time from the date such automobile was acquired through the following September 30. Title 51, Section 693, 1940 Code, reads pertinently as follows:

"Provided, however, that for new and used automobiles acquired subsequent to November fifteenth in any tax year these licenses shall be purchased on a monthly declining basis of one-twelfth, or for each month of the tax year, and that the purchaser shall only buy a license for the then remaining months of the tax year. *** " (Underscoring supplied.)

Under the provisions of Title 51, Section 710, 1940 Code, as amended by Act 507, 1943 Legislature, the tax year, for automobile taxes, now ends on September 30, and the new tax year commences on October 1. The privilege of purchasing an automobile license on a "declining basis" is a statutory provision and applies only to automobiles acquired after November 15. The Legislature made no change in this Section of the Code when it changed the tax year, and we cannot extend the provisions of the statute.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

November 30, 1943.

Hon. C. D. Sallade,
City Clerk of Fairfield,
Jefferson County,
Fairfield, Alabama.

Western Union Telegraph Company not subject to municipal license in the City of Fairfield, Alabama.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for official opinion bearing date of November 5, 1943, is as follows:

"Subject: Telegraph Companies

"In prior years the City of Fairfield in setting up its License Schedule has never established a license covering the operation of telegraph com-

panies in this City.

"They do not operate an office with an operator but from year to year proprietors of various drug stores have handled incoming and outgoing messages by telephone. The delivery boys hired by these drug stores are used in the delivery of messages. Under Section 743, Title 37, of the 1940 Code, municipalities having a population of over 10,000 and not exceeding 25,000 are limited to an assessment for licenses for telegraph companies of \$100.00 per year. A large number of messages are delivered by telephone and then confirmed by mail to people who have telephones in this municipality. The question has arisen among several members of our Council that should we attempt to enforce collection of \$100.00 licenses against the telegraph company that they might withdraw their service through the drug stores and deny service other than delivery boy service from Birmingham to who do not have a telephone. Can they do that?

"We feel that we have missed quite a bit of revenue in not assessing telegraph companies heretofore and we are anxious to collect licenses from them if it will be possible to do so and not jeopardize service rendered our citizens. Can we levy licenses when the messages are handled over the telephone and when an office or place for the reception and delivery of messages is not maintained in the City?"

Title 37, Section 743, Code of 1940, commences as follows:

"§ 743. Telegraph companies.—There may be levied and collected by the several towns and cities in this state from any telegraph company or companies for the **privilege of doing intrastate business within the municipal limits** a privilege or license tax *** ." (Underscoring supplied.)

In view of the recent consolidation of the Postal and the Western Union Telegraph Companies, we now have, according to my understanding, only one telegraph company in position to serve the City of Fairfield, i. e., the Western Union Telegraph Company.

According to the "Western Union Tariff Schedule" as filed with the Alabama Public Service Commission, and according to information I am able to obtain from the Commission, the telegrams accepted by this company for delivery, in the City of Fairfield are accepted at the "sender's risk," under a stipulation that the telegraph company will, after receiving the message in Birmingham, deliver the message by telephone whenever possible, or will, acting as the sender's agent, attempt to have same delivered. You do not indicate whether the proprietors of the various drug stores handle the messages originating in Fairfield, merely as a service to the public, or whether they are paid a commission by the telegraph company. I am forced, therefore, to assume that such proprietors act as the sender's agent and not as the agent of the telegraph company.

Under the facts as stated in your inquiry, and as above set forth, it is my opinion that the Western Union Telegraph Company is not doing business within the municipal limits of the City of Fairfield, and is not subject to the imposition of the license contemplated under the above cited Code Section.

It is my further opinion that the use of telephone services to deliver telegraph messages, where no employee of the telegraph company enters the municipal limits of Fairfield, does not constitute "doing business" within the contemplation of the statute.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 1, 1943.

Hon. John C. Morrow,
Judge, Tenth Judicial Circuit,
Court House,
Birmingham, Alabama.

Jefferson County—Code 1940, Tit. 62, § 366; Tit. 13, §§ 261-267—
Court Reporters' Transcript Fees—Act No. 249, H. 115, June 24, 1943—
Automatic Appeals—Indigents.

1. Court Reporter in Jefferson County for transcript of testimony and proceedings for appeal of indigent person from sentence of death, pursuant to Act No. 249, H. 115, approved June 24, 1943, entitled to a fee of 15 cents for each one hundred words of transcript, and upon request of circuit judge or solicitor must furnish copies without further compensation.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of November 15, 1943, is as follows:

"The Court reporters for the two criminal divisions of Jefferson County hold appointment under a local Act of the Legislature of 1923. (1940 Code, Title 62, Section 366).

"This Act provides a fee of 15 cents per hundred words for transcript, but does not stipulate what fee shall be charged for carbon copy or copies made at same time as original, so that there seems to be no law covering this item. (The universal custom in this district has been for years a minimum fee of one-half price for carbon copy).

"(It should be noted that the general State statute (1940 Code, Title

13, Section 261) could not here apply, as it is expressly provided in said Section 261 that "The Provisions of this article shall not apply to Circuits which consist of only one county and have three or more than three judges." (This county, as you know, has 11 judges).

"The automatic appeal bill signed June 24, 1943, (H. B. 115) provides an appeal for every defendant in Alabama who is given the death penalty. This law provides that under certain circumstances the State will pay for the transcript of the testimony for the defendant, and for all **required** copies.

"Will you kindly give opinion on the following:

"1. If the court reporter in either division of the Criminal court of this county furnishes, under proper order by the court, a transcript of testimony to an indigent appellant, under said House Bill 115, what fee shall be allowed for the original transcript?

"2. In such case, what fee shall he be allowed to charge the State for one carbon copy of the testimony made at the same writing as the original?

"3. In such case, what fee shall he be allowed to charge the State for any additional carbon copies made at same writing as original?"

Court reporters for the criminal divisions of the Circuit court of the Tenth Judicial Circuit, composed of the County of Jefferson, are expressly declared by statute to be officers of the court. Code 1940, Tit. 62, § 366. Their duties, compensation and tenure of office are fixed by law. That they are public officers does not admit of doubt.

The statute, § 366, supra, fixes an annual salary of \$2,400 for them, and in addition thereto "a transcript fee of fifteen cents for each one hundred words" for transcripts of their stenographic notes, which are "treated as a part of the records" of the court; and they are required to "furnish to the judge or solicitor a transcript of the proceedings in any case, upon request of said judge or solicitor, and shall receive no fee for such services."

In other circuits, court reporters receive the same annual salary as in the tenth circuit, but for transcripts of their stenographic notes they receive "ten cents for each one hundred words, and for each carbon copy made at the same writing, five cents for each one hundred words." Code 1940, Tit. 13, §§ 261, 262, 263, 267.

In neither instance do I find any express provision for transcript fees other than as above stated.

By Act No. 249, H. 115, approved June 24, 1943, in all cases where persons are tried, convicted and sentenced to death, provision is made for "automatic appeals," and expenses incident to such appeals in the case of indigent persons consisting of counsel fees upon appeal and transcripts of the proceedings in the court below are payable out of the state treasury. §§ 5, 11, 12.

The Court reporter's fees for "transcribing the testimony and other proceedings" in such cases are to be ascertained by the Circuit Clerk, "together with lawful fees for furnishing copies thereof as provided by law or ordered so to do." §12.

A court reporter, whether serving in the tenth or some other circuit, being a public officer, must look to the statute for compensation and is authorized to receive only such compensation as the statute expressly prescribes,—as in the case of the clerk, sheriff or other officer of the court.

In the tenth circuit no fee is prescribed for making copies. On the contrary the reporter must furnish them to the judge and solicitor upon request. Whereas in other circuits the reporter receives only ten cents per hundred words and five cents per hundred words for carbon copies, in the tenth circuit he receives fifteen cents per hundred words for his transcript. In both cases the rate is, to quote from Section 12 of Act No. 249, *supra*, either "provided by law" or "ordered". There is no authority of law, so far as I am able to find, for any other or additional rate. The legislature itself has seen fit to fix the rate, rather than delegate authority to fix it. The reporter as a public officer, holding office *cum onere*, must discharge the duties imposed upon him by law upon the terms expressly fixed by law. 43 *Am. Jur.*—Public Officers—§§ 340, 357, j. 147; *U. S. v. Van Duzee*, 185 U. S. 278, 46 L. ed. 909; *Mobile County v. Williams, Judge*, 180 Ala. 639, 61 So. 963; *Pollard v. Brewer*, 59 Ala. 130, *Troup v. Morgan County*, 109 Ala. 162, 19 So. 503; *Torbert v. Hale County*, 131 Ala. 143, 30 So. 453.

This result, in my opinion, is not affected by the fact of "universal custom" to which you refer.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 2, 1943.

Hon. H. M. Hughes,
Clerk, Madison County,
Huntsville, Alabama.

APPEALS FROM COURTS OF RECORD.

1. In all courts of record having a full-time court reporter under the law bills of exceptions are abolished by H. B. No. 76 of the Legislature of 1943, and a certified transcript of all the evidence by the court reporter is substituted for bills of exceptions.

2. In making the transcript on appeal the clerk enters a copy of this certified transcript of the evidence in the same manner formerly employed in entering copies of the bills of exceptions.

3. Copies of the court's oral charge, given and refused charges shall be copied into the transcript in the same manner as was required prior to the act abolishing bills of exceptions.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion bearing date of November 23, 1943, is as follows:

"In Re: Act Number 461, Approved July 12, 1943.

"I should appreciate your opinion as to certain aspects of the above Act, and should like for you to answer the following questions:

"(1) Should the Circuit Court Clerk copy the transcript of the evidence, filed by the court reporter in the event an appeal is taken, or is the court reporter's transcript, after proper certification and filing with the Clerk and approval by the Court, mailed directly to the Appellate Court, and not copied by the Clerk?

"(2) How should the Court's oral charge and any given or refused charges be shown in the record sent to the Appellate Court?"

The purpose of the recent Act of the Legislature, No. 461, approved July 12, 1943, was to abolish bills of exception in the circuit courts, courts of like jurisdiction and all other courts of record where such courts had under the law a full-time court reporter, and substitute in lieu of the bill of exceptions a certified transcript of all the evidence by such full-time court reporters. The Act requires this transcribed evidence to be filed with the clerk.

Under the law prior to this new act the party desiring to appeal gave

notice thereof under Title 7, Section 766, and filed a bill of exceptions with the clerk within the time named. The clerk was required to make and deliver to appellant a full and complete transcript of the record and **proceedings** in the case. (Section 768.)

Section 767 of this title requires the clerk on application of the appellant to make and deliver to him a full and complete transcript of the record and proceedings in the case.

Section 771 of this title requires the clerk to keep on file a copy of the record of all cases certified to the Supreme Court.

Very broad and exacting duties are required of the clerk as to the keeping of books, papers, and records of suits, etc., and the duty to furnish copies thereof to persons applying therefor.

Rules 23, 25 and 26 of the Supreme Court shed a controlling light on this subject. Code, Title 7, page 1013. Rule 25 provides that no original bill of exceptions or paper read or offered in evidence shall be sent to the court but that copies thereof shall be inserted in their proper places in the transcript. Rule 26 catalogues with minuteness and great length the mode of preparing transcripts, setting out in detail the order in which the papers shall appear in the transcript and Rule 23 requires that the transcripts must be on paper of uniform size, etc.

When Act No. 461, now under review, is considered in connection with the above sections and rules of the Supreme Court it is reasonably clear that it made no attempt to change your duties as to keeping your records and preparing transcripts on appeal other than as to bills of exceptions. Your duty is to keep on file in your office the certified copy of the certified transcript of the evidence of the case, certified by the court reporter just as you would keep on file the bill of exceptions when filed with you. When you come to make up a transcript on appeal you should enter a copy of this certified transcript of the evidence by the court reporter in the same manner as you formerly entered a copy of the bill of exceptions. You continue to enter copies of the court's oral charge and given and refused charges in your record just as was required before the passage of the Act here under review.

On October 7, 1943, we rendered an opinion to Hon. O. L. Andrews, Clerk of the Circuit Court of Jefferson County, wherein we stated that the certified transcript of the evidence of the court reporter, filed with the clerk should be attached to and become a part of the record on appeal. This statement was ill-advised. On further consideration we think we were in error on this point, and this part of that opinion is hereby overruled.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 2, 1943.

Hon. C. D. Sallade,
City Clerk of Fairfield,
Jefferson County,
Fairfield, Alabama.

American Railway Express Agency cannot abandon its service within the corporate limits of the City of Fairfield without a permit issued by the Alabama Public Service Commission.

City of Fairfield may impose municipal license on express companies doing business therein.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for official opinion bearing date of November 5, 1943, is as follows:

"Re: Express Companies

"Under Section 741, Title 37 of the 1940 Code Municipalities are permitted to assess express companies operating in Municipalities over 10,000 and not exceeding 15,000 people \$175.00 as an annual license.

"The express company does not maintain an office in the City of Fairfield but any package of merchandise or otherwise are accepted at any point in the United States for delivery to locations in this City or shipments leaving the City the parties having need of express service telephone the Ensley or Birmingham office and they will come to the house or store, pick up the packages and route them to the proper place consigned. The operator of the truck collects at the time the goods is received and delivered.

"The City proposes to make a levy for licenses from express companies and we want to know if the express company could deny the citizens the right of delivery to their homes or stores or if they could refuse to take up express when they are notified that express is at any location in the City ready for shipment. We do not want citizens to have to take their express to Ensley or Birmingham for delivery to the Express company office.

"A license has never been collected by us from the express company but it is our intention to make such collection this year provided the interest of the citizens of our community are protected."

Please let me call your attention to the first sentence in Section 741, Title 37, 1940 Code, which is pertinently as follows:

"Express companies.—There may be levied and collected by the several towns and cities of the state from any express company or companies for the privilege of **doing business** within the municipal limits a privilege or license tax to be computed and based on the populations of said cities, *** ." (Underscoring supplied.)

The City of Fairfield's authorization to impose a license tax on the express companies depends primarily on whether or not such companies are "doing business within the corporate limits" thereof. I am unable to find an identical case. However, an analogous situation was involved in **Louisville & N. R. Co. v. Dawson**, 14 Ala. App. 272, 68 So. 674, wherein it was held that a railroad accepting and delivering freight and passengers at station, having no station agent, the building being used for storage of freight and the convenience of the passengers, was **doing business** at such point. In his opinion, Mr. Justice Brown cited with approval from **Beard v. U. & A. Publishing Co.**, 71 Ala. 60, "Is the corporation engaged in the transaction of business, or any part thereof, it was created and organized to transact? If it be, it 'does business' within the meaning of the Constitution." Also see **American Bakeries Co. v. City of Opelika**, 229 Ala. 388 157 So. 206.

It is therefore my opinion that in the factual situation you have outlined, the express companies are doing business within the City of Fairfield, and are subject to the imposition of a municipal license under the provisions of the cited Code Section.

In your inquiry, you designate the parties rendering express service within the incorporated limits of Fairfield as "Express Companies." However, upon inquiry at the Alabama Public Service Commission I find that according to their records only the "Railway Express Agency, Inc." is rendering such a service. This organization under "Alabama Section, Joint Directory, No. 3, 15th., Rev." as filed with the Alabama Public Service Commission shows the City of Fairfield as included within the delivery and collection limits of Birmingham, and the abandonment of service thereto is prohibited by the provisions of Title 48, Section 106, 1940 Code, until the Alabama Public Service Commission issues a permit allowing such abandonment. It is my opinion that the Railway Express Agency, Inc., cannot voluntarily abandon the service it is rendering within the corporate limits of the City of Fairfield. However, it may by proper application to the Alabama Public Service Commission obtain a permit authorizing such abandonment, the issuance or refusal of such permit obviously depends upon the evidence offered in such a proceeding. Title 48, Sections 107, et seq., 1940 Code.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 2, 1943.

Hon. Ben P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Feeding county prisoners—Feeding State prisoners.

There should be a separate account prepared by the sheriff or jailer in charge of feeding prisoners for feeding and preparing food for county prisoners. Likewise there should be a separate account prepared in like manner for service and for preparing food and serving same to state prisoners.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of November 2, 1943, is as follows:

"Under date of September 24, 1943, your office rendered an opinion to this Department in which you held that the Sheriff to be entitled to service allowance account of prisoners for which the County paid the cost of food.

"Reviewing House Bill 421, Act 575, approved July 7, 1943, and Title 13, Section 383, 1940 Code, it is requested that you clarify this opinion as to whether or not this ruling meant that an allowance be made to the Sheriff based upon the number held in jail by the Sheriff each day, whether they be juveniles, insanes, venereal disease patients, or others payable by the County, just as the allowance is made to the Sheriff based upon the number of State prisoners each day, and the County pay the Sheriff for the food fed the juveniles, insanes, venereal disease patients, and others payable by the County, according to the per capita cost as paid by the State for State prisoners."

It is my opinion that the above request should be answered in the affirmative.

Taking into consideration Act No. 575, approved July 7, 1943, together with Title 13, Section 383, Code of Alabama 1940; also Title 45, Section 144, Code of 1940, which is as follows:

"§ 144. Allowance for feeding prisoners.—Food for prisoners in the county jails, except as otherwise provided by section 76 of this title, shall be paid for by the state as follows: There shall be allowed such amount as is actually necessary for food for each prisoner daily, but the said amount so allowed cannot exceed forty-five cents per capita."

It is my opinion that the terms of Title 45, Section 144, supra, should be

applied to all prisoners confined in jail regardless of whether they be state or county prisoners and the sheriff or jailer in charge of feeding prisoners confined in jail should at the end of the month in making out his feed bill make out one to the county for feeding its prisoners, based on the average per capita price for feeding all prisoners for the month, together with the cost of preparing and serving food to county prisoners according to the terms and scale set forth in Title 45, Section 145, Code of 1940, which is as follows:

"§ 145. Allowance for preparing and serving food.—The sheriffs of the several counties of the state shall receive pay for services in preparing food, serving food and other services incident to the feeding of prisoners, not including the cost of food to be served to such prisoners, as follows: For 1 prisoner one dollar per prisoner per day; for each prisoner from 2 to 5 prisoners fifty cents per prisoner per day; for each prisoner from 6 to 10 prisoners forty cents per prisoner per day; for each prisoner from 11 to 20 prisoners thirty cents per prisoner per day; for each prisoner from 21 to 85 prisoners five cents per prisoner per day.

"In all counties where there are two or more jails the report of prisoners in said jails shall be made upon the number of prisoners confined, but the sheriff shall be only paid as if all of said prisoners were confined in one jail."

Now, in making out his bill for feeding state prisoners he should follow the same method for making out his account for these as he has followed in making out his account for feeding county prisoners.

Any opinions of this office heretofore rendered that are in conflict with the above opinion are hereby modified to conform herewith.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 3, 1943.

Hon. G. R. Swift,
State Highway Director,
State Highway Department,
Capitol.

TAXATION—

1. The Federal Government is without power to levy a tax on state property or on state agencies exercising state functions of government.

2. The National Transportation Act, Title 26, Section 3475 U. S. C. A., neither prior nor subsequent to its amendment by Congress in November 1943, subjected the State to the tax therein levied.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of November 24, 1943, is as follows:

"Effective December 1, 1942, Congress passed Internal Revenue Code incorporating Section 3475, Transportation of Property. This section provided for exemption '(b) Exemption of Government Transportation.—The tax imposed under this section shall not apply to amounts paid by or to the United States or any agency or instrumentality of the United States for the transportation of property.'

"This exemption necessitated the State agency to pay direct to the railroad for transportation in order to be relieved of the tax involved.

"We are currently advised that Congress passed an amendment H. R. 3338, signed by the President November 4, 1943, which is now called Public Law 180, which amends this original section. As amended, Sec. 3475 (b) reads as follows: '(b) Government Transportation.—The tax imposed under this section shall not apply to amounts paid for the transportation of property to or from the Government of the United States, or any State, Territory, or political subdivision thereof, or the District of Columbia, or to amounts paid to the Post Office Department for the transportation of property.'

"It appears that under the amendment as long as the transportation of property is paid for shipments from or to a State agency, this cost would be exempt from tax whether paid by the State agency or the shipper.

"Will you please give us your opinion as to the interpretation of the

amendment regarding the payments paid by vendors for transportation of property to the various State departments, relative to the exemption of taxes if made in this manner."

Your letter indicates that you are of the opinion that Section 3475, Title 26, U. S. C. A., prior to its amendment levied a tax upon the state and its agencies. In this it is our opinion that you are mistaken for two reasons:

First, it is the settled law of this country that owing to the peculiar form of our government and from the relations of the states to the National Government and its authority, there are certain inherent limitations upon the power of each to tax, among which is the principle that the state cannot levy a tax on the Federal Government or its property or agencies and the Federal Government cannot levy a tax upon the state or its agencies in the performance of its governmental duties, nor can it levy a tax upon the state's property.

Second Cooley, Constitutional Limitations, Eighth Edition, pages 995-998;

Cooley on Taxation, Fourth Edition, Sections 86, 90 and 113;

61 Corpus Juris., pages 343, 359, 366, and 371.

This principle is so well settled that further citation of authority is unnecessary.

Second, it is a settled rule of construction of Acts of Congress and of statutes generally that where a statute contains no words to express an intention to divest a sovereign state or government of any right, privilege, title or interest or an intent to fasten burdens or liabilities upon this government it will be presumed that the intent does not exist. **United States v. Herron**, 87 U. S. 251. Our Supreme Court holds to like effect. **State ex rel Smith v. McCord**, 203 Ala. 347; **Ex Parte Loveman, Joseph and Loeb**, 241 Ala. 379.

The amendment referred to in your letter did no more than expressly declare what was already the law. It follows that the State and its agencies are not subject to the tax levied by the Transportation Act.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 3, 1943.

Hon. Charles W. Thompson,
Superintendent of Education,
Coosa County Board of Education,
Rockford, Alabama.

Coosa County—Term of office of Superintendent of Education.

Title 52, Section 102. Local Acts, 1943 No. 23, H. 140. General Acts 1943, No. 569, H. 311.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for official opinion bearing date of November 10, 1943, is as follows:

"The Coosa County Board of Education, Rockford, Alabama in a meeting on April 16, 1943 elected me to an appointed term as County Superintendent of Education of Coosa County for a period of two years, beginning July 1, 1943 and extending through June 30, 1945.

"In Section I of An Act, H-140 by McDonald, it states that the successful candidate in the general election for the year 1944 shall take office on the first Monday after the second Tuesday in January after his election. Section V of this act states that all laws and parts of laws in conflict with the provision of this act, insofar as they relate to Coosa County, Alabama, be and the same are hereby repealed. This local act was approved on May 20, 1943.

"Under the heading of Alabama General Laws of the regular session of 1943, H-311 by Dodson states in Section I: That in counties in which the county superintendent of education is elected by popular vote that the successful candidate shall take office on the July 1, following the date of his election. Section II of this same act states that all laws, general, special, and local, in conflict with the provisions of this act be and the same are hereby repealed. This act was approved on July 7, 1943.

"I wish to know if the appointed term specified by the Coosa County Board of Education as extending from July 1, 1943 through June 30, 1945 shall come to an end on the first Monday after the second Tuesday in January of 1945 or on June 30, 1945. Also, will the person or persons who enter the face for the county superintendent of education for Coosa County do so in the primary and general election of 1944. Your opinion as to when my appointed term will come to an end will be greatly appreciated."

(1) It is my opinion that your term of office, as County Superintendent

of Education ends on June 30, 1945; and

(2) That the person or persons who enter the race for the office of County Superintendent of Education for Coosa County shall do so in the primary and general election of 1944.

1. Your statement of the facts set out that the Coosa County Board of Education appointed you as Superintendent of Education for the county on April 16, 1943—your two year term to commence on July 1, 1943 and to extend through June 30, 1945. I note that by Local Acts 1935, p. 53 (approved June 11, 1935) the local act providing for the election of the Coosa County Superintendent was repealed, and therefore the general law providing for the appointment of superintendents was effective in your county on the date (April 16, 1943) of your appointment. The general law authorizing your two year appointment provides:

"§ 102. Chief executive and secretary; superintendent of schools.—There shall be a county superintendent of education in each county of this state who shall act as the chief executive officer of the county board of education, and who shall also be secretary of the county board of education. The county board of education of each county shall appoint a superintendent of schools for a term of from two to four years from the first day of July next succeeding his appointment."

Having been appointed by authority of this statute and without further legislation, you would hold office for the period prescribed by the board (two years).

However, on May 20, 1943, after your appointment, but before your term began, the legislature provided by local law for the superintendent to be elected by popular vote at the general election in 1944. **Local Acts, 1943, No. 23, H. 140—McDonald.** Thus the method of selecting the superintendent was changed. Under this local act the superintendent elected in 1944 was to take office and begin his term in January, 1945.

After the approval of the local act (1943 No. 23, H. 140), there may have been some doubt as to whether your term would end in June 1945, as originally set by the board, or in January 1945, the date for the beginning of the term of the superintendent to be elected in 1944. This doubt, however, is obviated by the General Act of 1943, No. 569, H. 311—Dodson providing:

"Section 1. That in counties in which the county superintendent of education is elected by popular vote, that the successful candidate shall take office on the July 1 following the date of his election; provided, however, that this act shall not operate to reduce the term of office of any incumbent of said office at the time of the effective date of this act, nor shall this act operate to reduce the term of office for which any person has been elected county superintendent of education who has not taken office at the time of the effective date of this act; provided further, that in any county in which the county superintendent of education has been elected at the general election in November, 1942, to take office for a four-year term beginning July 1, 1944, the successful candidate for the office of county superintendent of education in such county at the

general election in November in 1946 shall hold office for a term of five years beginning with July 1, 1948, and his successor shall be elected for a four-year term at the general election in November in 1952, and thereafter every four years.

"Section 2. That all laws, general, special, and local, in conflict with the provisions of this act shall be and the same are hereby repealed."

The above quoted Act was approved on July 7, 1943 after your term had begun and at the same session of the legislature at which Local Act, 1943, No. 23, H. 140—McDonald, was enacted. It is my opinion that if Local Act 1943, No. 23, H. 140 could be construed to shorten your term that this local act was expressly or by necessary implication amended by the above quoted general act. On July 7, 1943 your county was one of the "counties in which the county superintendent of education is elected by popular vote ***" and had been such county since May 20, 1943. It follows that the above quoted act changes the date, prescribed by the local act of May 20th, for the beginning of the term of the elected superintendent from January 1945 to July 1945. This latter date coincides with the expiration of your original term.

The local act providing that the Superintendent of Education for Coosa County take office in January after his election in November 1944 was expressly or by necessary implication amended by the General Act of 1943, No. 569, H. 311 so that the successful candidate elected in 1944 under the local act shall take office the following July and not the following January.

2. Candidates who enter the race for Superintendent of Education for Coosa County should do so in the primary and general election of 1944.

Sections 1 and 2 of Local Acts 1943, No. 23, H. 140 provide:

"Section 1. At the general election for the year 1944, and every four years thereafter, there shall be elected a County Superintendent of Education for Coosa County, Alabama, by the qualified voters of said county, who shall hold office for a term of four years from the first Monday after the second Tuesday in January next after his election, and until a successor is elected and qualified.

"Section 2. Candidates for the office of County Superintendent of Education for Coosa County shall be nominated as candidates for other county offices of Coosa County, Alabama, under the general laws of the State of Alabama."

The only amendment that has been made to this part of the act is that the person elected in 1944 shall take office in July following his election, rather than in January following the election. Therefore, those persons entering the race for election to the term of office beginning in July 1945 should enter the primary and general election of 1944 as prescribed by sections 1 and 2 above.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 3, 1943.

Hon. William A. Conrad, Clerk,
Circuit Clerk, Mobile County,
Mobile, Alabama.

1. The sheriff is entitled to a fee of \$1.00 for approving bond as often as he is required to do this in any one case.

2. The sheriff is entitled to a fee of \$1.00 for committing a person to jail as often as he is required to do so.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of November 8, 1943, is as follows:

"I respectfully request your Honor's Official opinion on the following questions, viz:—

"1.—In a case where the Sheriff has approved **two** bonds, how much costs shall be paid out of the convict fund for approving said **two** bonds?

"2.—In a case where a defendant has **twice** been lawfully committed to jail, how much shall be paid out of the convict fund for said **two** commitments?

"3.—In a case where stenographer has served two days, how much shall be paid out of the convict fund as stenographer's fee for said two days services?"

In answering the above request I refer you to Title 45, Section 68, Code of 1940. This section has to do with costs paid by the State when defendant is convicted and sentenced to hard labor or to the penitentiary and delivered to the State.

Answering your first request, I call your attention to Section 69, *supra*, where it says: "Approving bond . . . \$1.00." This simply means as often as the sheriff is called upon to approve a bond in any one case, he is entitled to charge for same. Quarterly Report Attorney General Vol. XVIII page 375.

Answering your second request, I also call your attention to Section 69, *supra*, where it says: "For committing persons to jail . . . \$1.00." This likewise means that the sheriff is entitled to this for as many times as he com-

mits defendant to jail in any one case. Quarterly Reports Attorney General, Vol. XIX, P. 78; Quarterly Reports Attorney General, Vol. XVIII, p. 375; Quarterly Reports Attorney General, Vol. XXX, p. 119.

In answering your third request, I call your attention to an opinion of this office written May 1, 1941 to Hon. B. P. Singleton, Chief Examiner of Public Accounts, Quarterly Reports Attorney General, Vol. XXIII, p. 106. This opinion holds:

"Department of Corrections and Institutions is chargeable with \$3.00 of the \$5.00 Court Reporter Fee provided for by Act. No. 194, H. 419, approved May 20, 1931, (Local Acts, 1931, p. 61)".

It is my opinion that the Court Reporter should receive \$6.00 from the Convict Fund for his two days service.

I enclose herewith copy of opinion herein above referred to.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 4, 1943.

Hon. William W. Hill,
Judge of Probate, Montgomery County,
Montgomery, Alabama.

Code 1940, Tit. 21, §§ 160 et seq.; Tit. 21, §§ 10 et seq.—Incompetent Veterans—Federal Benefits—Other Property.

Guardian appointed for incompetent veteran entitled to federal benefits or payments by reason of military or naval service, without inquisition of lunacy as required by Tit. 21, §§ 10 et seq., is not authorized to administer any of the property or estate of his so-called ward other than such benefits or payments.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of November 18, 1943, is as follows:

"A question has arisen as to whether a guardian appointed under the

terms of the Uniform Veterans' Act (Title 21, Sec. 160 et seq, Code of Ala. 1940) has the right to take into his custody and administer property of his ward derived from sources other than the Veterans' Administration.

"As you know, under the terms of the said Uniform Veterans' Act a guardian may be appointed on the certificate of two physicians, no inquisition of lunacy being necessary. No one questions the right of the Federal Government to prescribe such regulations as it may see fit as a condition precedent to awarding its benefits, but it is not clear, from the wording of the act, whether a guardian so appointed is authorized to administer all property of his ward, regardless of the source.

"In this connection, I might call attention to the fact that the Uniform Veterans' Act, as originally enacted in Code of 1923, specifically prohibited the guardian from administering any other property of the ward (Sec. 8125). However, when the act was re-enacted in 1931 and in 1940 this prohibition was eliminated.

"An actual case has arisen in Montgomery County where a guardian has been called on to restore property of the ward not derived from the Veterans Administration, and it is desired to have an opinion from your office as to the law on the subject."

Proceedings for appointment of guardians of persons of unsound mind are regulated by Code 1940, Tit. 21, §§ 9-19. Ordinarily such guardians must not be appointed without a trial or inquisition by a jury as to the sanity vel non of the person alleged to be of unsound mind. Tit. 21, §§ 10-14.

The bonds of such guardians must be in amount not less than double the estimated value of the personal property and three years' rental value of the real estate belonging to the ward. Tit. 21, § 27. The necessary procedure for lease of the ward's real estate, investment of his funds and all other details of administration of his estate is prescribed by law.

By an act approved Sept. 29, 1923, however (Gen. Acts 1923, p. 677, Code 1923, § 8125), special provision was made for appointment of guardians "for persons needing same, and entitled to the benefits of the Act of Congress of the United States known as the War Risk Insurance Act," and it was expressly declared in the act itself that its provisions were "in addition to the methods of appointment now provided by law; *** that notice by the United States Veterans' Bureau, or duly authorized officials of the United States Bureau to the effect that appointment of a guardian is necessary shall constitute a sufficient proof to justify the appointment of the guardian; *** that it shall not be necessary to cite the person for whom the guardian is sought, no jury need be summoned, and there shall be no pronouncement of insanity in the case." The act also restricted the power of such guardians to receipt and disbursement of moneys due the ward under Act of Congress or in the way of arrears of pay, bonus or otherwise for military or naval service. Acts 1923, p. 677, §§ 1-5.

This legislation was superseded and replaced (Acts 1931, p. 280, Acts 1936-7 Ex. Sess. p. 270) by subsequent enactments now appearing in the Code of 1940, Tit. 21, §§ 160-176, materially different in many respects from the pro-

visions of law as to guardians and wards generally and evidently dictated to conform to federal legislation and regulations providing benefits for mentally incompetent veterans and their dependents. Here again as in the Act of 1923 the necessity of an inquisition is avoided by provision that a certificate as to incompetency by the director of the United States Veterans' Bureau or his representative "shall be prima facie evidence of the necessity for such appointment." §§ 160, 165.

Provision for the bonds of such guardians is materially different from that prescribed for other guardians of incompetents under Tit. 21, § 27, and no reference is made to the value of the wards' estate, other than the federal benefits to which he is entitled, as a factor in fixing the amount of bond required for administration of his estate.

Clearly then the legislation with reference to incompetent veterans' benefits payable by the United States, as shown by the foregoing legislative history, was intended merely as a supplement or alternate to general law, operative merely as to such benefits. There is an entire absence of anything to indicate that this special, pro-hac-vice, legislation was intended to amend or repeal the salutary provisions of general law forbidding appointment of a guardian for a person of alleged unsound mind without an inquisition of lunacy, and forbidding administration of his estate (other than federal benefits) without ample protection by way of bond.

It may be said that this special legislation as to veterans and the general law as to incompetents overlap or conflict. In such case there is a plain duty so to construe the two statutes that each may have its own field of operation without clashing with the other. **Roberts v. Hunt**, 212 Ala. 475, 476, 103 So. 451.

Applying this rule of construction, I am of opinion that guardians appointed pursuant to Code 1940, Tit. 12, §§ 160 et seq., without inquisitions as required by Tit. 21, §§ 10 et seq., are not authorized to take possession of and administer any property of their wards, so-called, other than the aforementioned federal benefits or payments.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 4, 1943.

Honorable H. W. Lazenby,

Tax Assessor,

Lee County,

Opelika, Alabama.

Code 1940, Tit. 10, §§ 139-149; Tit. 10, § 150—Incorporated Social Clubs and Societies—Incorporated Public Improvement Societies—Chambers of Commerce.—Taxation—Exemptions

Social Clubs and societies incorporated under Code 1940, Tit. 10, §§ 139-149, and public improvement societies, such as chambers of commerce, incorporated under Tit. 10, § 150, or under prior similar acts of legislature, are no longer entitled to exemption from ad valorem taxation.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of November 26, 1943, is as follows:

"I note that Sections 7185 and 7192 Code of 1923 were eliminated from the 1940 Code. Does this mean that the property of (1) social and literary clubs organized under Section 7176-7189 and (2) societies for public improvement organized under Sections 7190-7192, 1923 Code, are now to be assessed for taxation and taxes paid thereon?

"There are in Lee County corporations of the kind designated in Section 7176 and also corporations of the kind designated in Section 7190, of the 1923 Code.

"The laws relating to 'Social Clubs' are now incorporated in the 1940 Code as Title 10, Secs. 139-149. The laws relating to 'Societies for Public Improvements' are in the 1940 Code as Title 10, Secs. 150.

"For instance there are two corporations in this county that I know of that were organized under Sections 7190-7192 of the 1923 Code. Their properties have been heretofore exempted under Section 7192. By referring to page 357 of Title 62 of the 1940 Code, it is noted that Section 7192 was carried forward into the 1940 Code as Title 51, Section 12, but upon referring to the latter it exempts only the property of Y. M. C. A., whereas its predecessor (Sec. 7192, 1923 Code) exempted the property of all corporations organized under Sec. 7190-7192.

"Section 7185 relating to exemptions of Social Clubs is eliminated entirely from the 1940 Code.

"Section 91 of the Constitution exempts property used exclusively for religious worship, for schools or for purposes purely charitable. Would the classes of corporations above referred to come within the purview of the charitable' exemption.

"Please see also Subdivision '(D)' of Title 51, Sec. 2 of the 1940 Code, exempting 'All the property of literary and scientific institutions and literary societies, when employed or used in the regular business of such institution.' If it could be said that this covered the above classes of corporations, yet this same quoted exemption appeared in the 1923 Code, along with Sections 7185 and 7192.

"I assume that all Chambers of Commerce, as was the Opelika Chamber of Commerce, were organized under Sections 7190-7192 of the 1923 Code. By carrying 7192 into the 1940 Code as Sec. 12, Title 51, the latter referring only to Y. M. C. A., would not the property of Opelika Chamber of Commerce, and all other similar organizations now be taxable?

"I will appreciate your advising me if assessments should be made of the properties of the classes of corporations designated in

"1. Title 10, Sec. 139, et seq. and

"2. Title 10, Sec. 150"

Code 1940, Title 10, Sections 139-149, authorizing incorporation of social clubs and societies, had its origin in Act No. 198 H. 156, approved August 25, 1909 (General Acts 1909 p. 193), which was carried into the Code of 1923 as Sections 7176-7189. Section 4 of the Act exempted the property of such corporations to an amount not exceeding \$2,000 from all state, county and municipal taxation and licenses, and this section appears in the Code of 1923 as Section 7185, except that such corporations are erroneously referred to as "corporations formed bona fide under Section 8061," although said Section has no connection whatever with such corporations and related to garnishments of money in the hands of trustees.

The Code provisions of 1923 are incorporated in the Code of 1940 without material change, except that Section 7185, has been dropped. Code 1940, Title 10, §§ 139-149.

Code 1940, Title 1, Section 9 declares, among other things, that subject to certain other provisions thereof, not material in this instance, "all statutes of a public, general and permanent nature, not included in this Code, are repealed." This of itself in my opinion is sufficient to repeal whatever exemption from taxation may have previously existed as to such corporations.

Societies for public improvements, (otherwise described as corporations or societies for development or betterment of communities and for the promotion of other public purposes without pecuniary profit to the individual members), were originally authorized to be incorporated under Act No. 180,—H. 178, approved February 19, 1919, (General Acts 1919, page 176.) By Section 3 of that Act the property of such corporations was exempt from all state, county and municipal taxation and licenses; and this exemption, together

with the other provisions for incorporation were carried into the Code of 1923 as Sections 7190-7192. These same statutory provisions now appear in the Code of 1940 under Title 10, as Section 150, except that the provision for exemption from taxation which appeared in the original act and in the Code of 1923 has been omitted.

I am opinion therefore that these corporations or associations are likewise no longer entitled to exemption from taxation. Code 1940, Title 1, Section 10.

Such exemptions are strictly construed in favor of the taxing power and against the taxpayer. *Bowman v. State Tax Commission* 235 Alabama 190, 178 So. 216. Associations or corporations of the type under consideration do not come within the operation of Section 91 of the Constitution, exempting property used exclusively for religious worship, schools and charitable purposes, nor within the influence of Code 1940, Title 51, Section 2, Subd. (D) exempting the property of literary and scientific institutions and societies employed in the business of such institutions of societies.

Likewise, assuming that chambers of commerce, to which you refer, were organized under Code 1923, Sections 7190-7192, I am of opinion that they are no longer exempt from taxation.

I do not think Code 1940, Title 51, Section 12 is material to the question inasmuch as it purports to exempt only property of Young Men's Christian Associations and has no reference whatever to any other form or type of society or association, although said Section 12 is erroneously indicated in Title 62, of the Code of 1940, on page 391, as derived from Section 7192 of the Code of 1923.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 7, 1943.

Hon. Chauncey Sparks,
Governor of Alabama,
Capitol.

Reports—Department Heads—Time for Filing—

Report of activities of the various Departments of the State of Alabama required to be filed under Act 253, House 242, General Acts of Alabama, Regular Session, 1943, discussed generally.

Opinion by Assistant Attorney General Hawkins.

Dear Governor:

I have your request for official opinion under date of December 6, 1943, which is as follows:

"Please give me your official opinion as to the time in which the several department heads of the State of Alabama are required to make a report of the activities of their departments.

"In this connection your attention is directed to Act 253, House 242, General Acts of Alabama, Regular Session, 1943."

Act No. 253, H. 242, General Acts of Alabama, Regular Session, 1943, in creating the Division of Records and Reports in the office of the Governor, provides in part, as follows:

"Section 3. It is hereby required that each department, board, commission, institution, agency, and office of the State of Alabama shall furnish annually a report of its activities to the Division of Records and Reports. The Director of Records and Reports may require of State departments, boards, commissions, institutions, agencies and offices such additional and supplementary reports as may be necessary for adequate reporting of the State's activities."

This Act further contains a clause repealing all laws in conflict therewith.

Therefore, it appears that where there is no provision of law requiring an annual report of activities from any State department, board or agency, or where there is a provision of law requiring such report, but in conflict with the above quoted Section 3, the said Section must govern.

Title 55, Sections 110 and 121, Code of Alabama 1940, provide for the printing of such reports or such parts thereof as the Governor may deem necessary. It is further provided that all such reports authorized to be printed shall be filed on or before the 10th day of October, annually or biennially as may be required by law, for the annual or biennial period ending on September 30, theretofore. By virtue of said Act No. 253, all such reports are now

required to be made annually.

The following departments, boards, agencies heretofore have not been required to make such reports of their activities:

Department of Archives and History.

Department of Commerce.

Department of Public Welfare.

Department of Revenue.

State Defense Council.

State Highway Patrol.

State Personnel Board.

State Planning Board.

The effect of Act No. 253, supra, on the above department is that henceforth they will be required to submit to the Division of Records and Reports annually reports of their activities which are subject to the general provisions of Title 55, Section 121, on or before the 10th day of October for the fiscal year ending the preceding September 30.

Title 49, Section 5, Code of 1940, requires the Commission of Public Welfare to make annually a full report of the operation and administration of the State Department of Public Welfare to the State Board of Public Welfare. Title 55, Section 299, Code of 1940, requires the State Director of Personnel to make an annual report to the State Personnel Board. In order to avoid duplication, if these two reports reflect the activities of their respective departments for the preceding fiscal year, they may be filed as provided above for the annual report of such departments to the Division of Records and Reports.

The following departments have heretofore been required to make an annual report of activities to the Governor, the time and printing of which was governed by the said Title 55, Section 121:

Department of Conservation. (Title 8, Section 2.)

Department of Health. (Title 22, Section 11.)

Department of Industrial Relations. (Title 26, Sec. 3.)

Department of Labor. (Act No. 298(Acts of 1943.)

Under the present law, these departments shall continue to make such

reports which, however, must be submitted to the Division of Records and Reports.

The following departments and agencies have heretofore been required to make annual reports of their activities to the Governor, but the particular laws pertaining to each department varied as to the time at which such reports must be made:

Alcoholic Beverage Control Board. (Month of January, Title 29, Sec. 4.)

Board of Agriculture and Industries. (On or before Dec. 1, Title 2, Sec. 19.)

Board of Pardons and Paroles. (Between Oct. 1 and Dec. 31, Title 42, Sec. 5.)

Fire Marshall. (One or before April 1, Title 55, Sec. 29.)

Public Service Commission. (On or before Jan. 10, Title 48, Sec. 25.)

State Board of Education. (Dec. 1 or as soon thereafter as practical, Title 52, Sec. 26.)

The above quoted Section 3 of Act No. 253 supersedes the statutes pertaining to these separate departments, and under the general law providing for the printing of such reports, unchanged by Act No. 253, the annual reports of the activities of these departments must be filed on or before October 10 succeeding the end of the fiscal year.

The following departments have heretofore been required by law to make biennial or quadrennial reports of their activities:

Adjutant General. (Biennially on or before Dec. 1, Title 55, Sec. 70.)

Attorney General. (Quadrennially in Oct., Title 55, Sec. 228.)

Department of Corrections and Institutions. (10 days before convening of Legislature, Title 45, Sec. 19.)

The requirement of these biennial and quadrennial reports has not been abolished, but there is an additional requirement under the said Act No. 253, to make an annual report. On the years in which the biennial or quadrennial reports must be made, if the annual reports of activities cover the matter required in the biennial or quadrennial reports, such annual reports will suffice for the two reports otherwise required.

The following State departments and agencies have heretofore been required to make annual financial reports. The first three agencies have heretofore been required to make a joint financial report as soon as possible after the end of the fiscal year. The Teachers' Retirement System came under the provisions of Title 55, Section 121, requiring reports to be filed on or be-

fore October 10:

Department of Finance. (Title 55, Sec. 62.)

State Auditor. (Title 55, Sec. 205, Const. 1901, Sec. 137.)

State Treasurer. (Title 55, Sec. 211, Const. 1901, Sec. 137.)

Teachers' Retirement System. (Title 52, Sec. 367.)

These departments must now make annual reports of their activities. If these activity reports include the above financial reports, no other report will be required.

Title 23, Section 5, Code of 1940, requires the Highway Department to submit a printed report to the Governor on or before the 1st day of April of each year, which report shall reflect the number of miles of road built or improved, culverts and bridges constructed, and the cost and nature thereof, and the location of materials suitable for road construction, together with recommendations for legislation pertaining thereto. This statute does not appear to have been repealed, but the Highway Department, under Act No. 253, has the duty to furnish a report of all its activities on or before October 10. If this annual report contains the matter required by Title 23, Section 5, there is no necessity for a later duplication of this work.

Title 55, Section 182, Code of 1940, requires the Secretary of State to make annually by September 30 to the Governor a verified and itemized account of all moneys and fees received by his office, and of all disbursements made by him. Although the report of all the activities required by Act No. 253 contemplates a more comprehensive report, if the financial report made under the provisions of Title 55, Section 182, includes all the activities of the office of Secretary of State, it will suffice as the annual report now required by law.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 7, 1943.

Honorable Winston Stewart,
Judge of Probate,
Coosa County,
Rockford, Alabama.

Fine and Forfeiture Fund—Coosa County—Title 12, Sec. 33, Code 1940—Title 12, Sec. 34 Code 1940.

Excess of Fine and Forfeiture Fund can not be transferred to General Fund at end of fiscal year in the absence of the required list of registered claims and charges.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of November 24, 1943 is as follows:

"The Fine and Forfeiture Fund of Coosa County operates under the general laws, there being no local laws pertaining thereto.

Receipts of this fund are such that claims and charges against the fund are paid when presented without the necessity of registering these claims and charges, there being an excess of receipts on hand at the close of each fiscal year.

"Would the Commissioners Court be authorized to transfer any part of this excess to the general fund of the county by proper resolution entered on the minutes of the Court?

"Title 12, Section 34, 1940 Code, appears to be the authority for transferring the excess over the registered claims and charges.

"In the absence of a list of registered claims and charges would not the balance in the fund constitute the excess?

"If any transfer may be legally made it is contemplated to retain in the fund an amount sufficient to meet the anticipated demands of the fund."

It is my opinion that the Court of County Commissioners of Coosa County may not authorize the County Treasurer to transfer the balance of the Fine and Forfeiture Fund on hand at the end of the fiscal year to the General Fund in the absence of a list of registered claims and charges.

Title 12, Section 33, Code of 1940, places upon the County Treasurer the

duty to register all claims against the Fine and Forfeiture Fund in the order in which they are presented, and to keep in well bound books the registration of such claims. This mandatory requirement is designed not only to determine the priority of claims against the Fine and Forfeiture Fund, but also to provide a permanent record by which the status of such fund may be readily ascertained.

Title 12, Section 34, Code of 1940, authorizes the transfer of such balance only when it is in excess of the registered claims and lawful claims or charges against the Fine and Forfeiture Fund.

Reading these statutes in *pari materia*, it manifestly appears that the Legislature contemplated the transfer provided for in Section 34, *supra*, only after the County Treasurer had complied with the duty imposed upon him by the said Section 33, to keep an accurate and permanent registry of the claims presented against the Fine and Forfeiture Fund.

An opinion of this office to Hon. J. F. Hitchcock, Clerk Circuit Court, Union Springs, Biennial Report Attorney General 1934-1936, p. 233, citing the cases of *Brown and Street v. Farris*, 93 Ala. 314 and *Ryan v. Collins*, 196 Ala. 478, emphasized that the Legislature has control over the Fine and Forfeiture Fund and that the authority of the county governing body to dispose of such fund was strictly limited to that expressly granted by legislative enactment. An application of this principle prohibits the transfer in the absence of a list of registered claims.

It is my opinion, therefore, that in the absence of the required list of registered claims and charges, the proposed transfer should not be made.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 8, 1943.

Hon. Hugh White, President,
Alabama Public Service Commission,
Montgomery 1, Alabama.

Public Service Commission—State Aviation Commission—Air Carriers—Title 48, Sections 301 (1) to 301 (51), Code of 1940—Title 48, Section 102, Code of 1940—Act No. 248, General Acts of Alabama of 1943.

1. Those statutes defining the jurisdiction of the Public Service Commission do not vest in it the authority to issue certificates of public convenience and necessity to intrastate air carriers.

2. Act No. 248, General Acts of Alabama of 1943, vests in the State Aviation Commission authority to regulate intrastate air carriers, precluding such authority in the Public Service Commission.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of November 19, 1943, is as follows:

"The Public Service Commission requests you for an official opinion on the question hereinafter set out.

"On to-wit October 11, 1943, Waterman Air Line, Inc. filed its application with this Commission for a certificate of public convenience and necessity for intrastate air transportation of persons and property between points in Alabama. A copy of this application is attached to this request and market Exhibit (1).

"At the hearing of this application of the Public Service Commission on November 4, 1943, the question was raised whether the Public Service Commission has jurisdiction over the matters presented by such application. At the conclusion of such hearing the Commission requested the applicant to file a brief in support of its application with respect to the Commission's jurisdiction and authority to grant the certificate prayed for. The applicant has filed a brief in support of its application and a copy of such brief is hereto attached and marked Exhibit (2).

"The Chamber of Commerce of Montgomery, Alabama, has also filed a brief in support of the application, which brief is addressed to the question of the jurisdiction and authority of the Commission to issue such certificate. A copy of this brief is attached hereto and marked Exhibit (3).

"The Public Service Commission requests your official opinion upon the question, whether or not, the Public Service Commission has jurisdiction and authority to issue a certificate of public convenience and necessity for intrastate air transportation of persons and property."

It is my opinion that the Legislature of Alabama has not vested the Public Service Commission with jurisdiction and authority to issue a certificate of public convenience and necessity for intrastate air transportation of persons and property.

Throughout the examination of those statutes defining the jurisdiction of the Public Service Commission, it must be borne in mind that the Supreme Court of Alabama has held that the Public Service Commission, being created by statute and granted authority in derogation of the common law right to operate a business without State regulation, has only such authority as is clearly granted to it upon a strict construction of the statutes vesting such authority (*Alabama Great Southern Railroad Co. v. Alabama Public Service Commission*, 210 Ala. 151, 97 So. 226).

In the light of this judicial pronouncement of statutory construction, unless the authority to issue certificates of public convenience and necessity to intrastate airlines is expressly granted, or necessarily implied, by the context of the statutes pertaining to the Public Service Commission, the assumption of such authority by the Public Service Commission would be in excess of its jurisdiction and acts performed in pursuance thereof would be *coram non judice*.

The contention of the applicant, evidenced by its brief attached to your request and Marked Exhibit (2), is that the Public Service Commission was granted jurisdiction over intrastate air lines by the Alabama Motor Carrier Act of 1939, which Act is set forth in the pocket parts of the Code of Alabama of 1940, designated as Title 48, Section 301 (1) to 301 (51).

It is my opinion that this contention is untenable. The type of motor vehicle with which this Act deals is defined thereby as "any vehicle, machine, tractor, trailer or semi-trailer, propelled or drawn by mechanical power, and used upon the highways in the transportation of passengers or property, but does not include any vehicle, locomotive, or car operated exclusively on a railroad or railroads." The insistence of the applicant that the term "highways" includes air lanes which are traveled by aircraft is refuted by the definition of the term "highways" contained in the same Act, as "every public highway, or place of whatever nature, open to the use of the public for purposes of vehicle travel in this state, including the public highways, roads, streets, and alleys in towns and cities." A study of the authorities fails to reveal any cases holding that the term "highways" includes air lanes; rather, it affirmatively appears that the term "highways," similar to the definition given above, extends only to surface roads, streets, alleys, etc. Our courts have held that where a statute contains general terms together with special terms designating particular subjects, to ascertain the legislative intent, there may be invoked the doctrine of *ejusdem generis*, i. e., that the general terms are limited to things or subject of the same kind as those particularized in the special terms. (*Dixie v. State*, 8 Ala. App. 338, 62 So. 1007; *Goode v. Tyler*, 237 Ala. 106, 186 So. 129.) A contrary holding would, if followed to its logical conclusion necessitate the subjection of aircraft to the State traffic rules im-

posed upon vehicles operated on the highways, and all forms of licenses and taxation imposed upon such vehicles. It is inconceivable that the Legislature of Alabama intended such a broad definition of the term "highways."

The brief of the Chamber of Commerce of Montgomery, Alabama, attached to your request and marked Exhibit (3), filed in support of the said application, urges the assumption of jurisdiction by the Public Service Commission on an entirely different basis. It is therein insisted that such jurisdiction is conferred by that part of Title 48, Section 102, Code of 1940, which reads as follows: " *** The term 'transportation company' shall mean and include every person not engaged solely in interstate commerce, or business that now or may hereafter own, operate, lease, manage, or control as a means of common carrier transportation by himself, or by others; *** "

A study of the foregoing isolated excerpt indicates that standing alone, it is incapable of interpretation, vests no jurisdiction, and is completely without grammatical meaning. In order to render it capable of construction, it is necessary to read the entire sentence written by the Legislature as follows: "The term 'transportation company' shall mean and include every person not engaged solely in interstate commerce or business that now or may hereafter own, operate, lease, manage, or control as a means of common carrier transportation by himself, or by others; any canal, or other artificial water course, or part thereof, in this state, or any public wharf, dock, or terminal used in connection therewith, whether owned by the person who owns such canal or other artificial water course, or otherwise."

Notwithstanding the fact that the first above quoted excerpt was set off from a remainder of the sentence by a semi-colon rather than a colon, a perusal of the entire sentence readily reveals that the actual legislative intent was to therein define "transportation company" as any person who owns, operates, or manages, as a means of common carrier transportation, any canal, public wharf, dock, or terminal used in connection therewith, except when such person is engaged solely in interstate commerce. This conclusion is definitely confirmed by an examination of Act No. 200, General Acts of Alabama, Extra Session, 1936, p 237, the original enactment of this law, which reads, in pertinent part, as follows:

"The term 'transportation company' shall mean and include every person not engaged solely in interstate commerce or business that now or may hereafter own, operate, lease, manage or control, as common carriers or for hire: (1) Any railroad or part of a railroad in this state, or any cars or other equipment used thereon, or bridges, terminals or sidetracks used in connection therewith, whether owned by such railroad or otherwise; (2) any express companies; (3) any car companies; (4) any sleeping car companies; (5) any steamboat or steam packet company or common carrier for hire by water regardless of the propelling power used; (6) any railroad depot or terminal station; (7) any telegraph line; (8) any telephone line. The term 'transportation company' shall also mean and include two or more transportation companies rendering joint service. The term 'transportation company' shall mean and include every person not engaged solely in interstate commerce or business that now or may hereafter own, operate, lease, manage, or control as a means of common carrier transportation by himself, or by others; (9) Any canal or other artificial water course, or part thereof, in this State, or any public wharf,

dock, or terminal used in connection therewith, whether owned by the person who owns such canal or other artificial water course, or otherwise. (10) Provided nothing in this Act shall apply to the regulation of commerce on navigable streams or rivers, whether the said streams or rivers contain locks or dams or not."

Therefore, it can be seen that the contention to the contrary is entirely without merit.

Subsequent to your request, you submitted the brief of another applicant filed before the Public Service Commission, which applicant proposes to transport in intrastate commerce commodities such as newspapers, periodicals, U. S. mails, film, and excluding cargo which is too large to be loaded in applicant's proposed equipment. The said brief invokes the jurisdiction of the Public Service Commission under another portion of the said Title 48, Section 102, Code of 1940, which statute, in defining transportation companies as railroads, car companies, sleeping car companies, steam boats, telegraph and telephone lines, includes therein "any express companies." This same definition is given "transportation companies" in the original statute found in Act No. 42, General Acts of Alabama, Extra Session, 1920, p. 92, and as far as this question is concerned, no subsequent amendment or codification has changed the terminology. Neither the language of this original Act nor the language of the said Section 102 indicates any legislative intent to impose upon aircraft carriers the regulatory measures therein provided. The brief of the latter applicant is based upon the contention that this statute is remedial, must be liberally construed, and, therefore, can be extended to include aircraft. As hereinbefore stated, it is necessary to place a strict construction upon such a regulatory statute, and by such construction, it can hardly be said that the Public Service Commission was, by the said Act of 1920, granted jurisdiction over a type of carrier which was not in its infancy until years later.

A contrary conclusion would necessitate ignoring that legal precept stated in the cases of **Huston County v. Martin**, 232 Ala. 511, 169 So. 13; **County Board of Education v. State**, 239 Ala. 276, 194 So. 881, and numerous other cases, which principle of law was aptly pronounced in the former case of **Mr. Justice Brown** in the following language:

"It is a well-settled rule of interpretation, applicable to constitutions as well as statutes, that it is permissible in ascertaining their purpose and intent to look to the history of the times, the existing order of things, the state of the law when the instrument was adopted, and the conditions necessitating such adoption. **Fox v. McDonald**, 101 Ala. 51, 13 So. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98; 16 R. C. L. p. 51 § 46."

An application of this legal axiom perforce results in the conclusion that the Legislature, intending to strictly regulate only those express companies and other carriers in existence at the time it imposed such regulation, did not intend to vest the Public Service Commission with authority to regulate a type of carrier which came into existence and proposed to operate in this state many years later.

Apart from the foregoing, there is an additional reason for which it must be held that the Public Service Commission is without jurisdiction over intra-

state air carriers. Act No. 248, General Acts of Alabama, 1943, created the State Aviation Commission and vested therein complete authority to supervise the aeronautical activities and facilities within the State of Alabama. Included in the powers of the State Aviation Commission is not only the authority to adopt safety rules, but also the authority to promulgate reasonable rules and regulations governing and requiring the certification of pilots, aircraft, and commercial air lines. Although the term "certificate of public convenience and necessity" is not used in the said Act, the State Aviation Commission is empowered to grant certificates "as it deems advisable in the best interests of public welfare, health and safety and the promotion of aeronautics." Thus, it appears that all the regulatory measures imposed by the Legislature upon air carriers are under the control and jurisdiction of the State Aviation Commission, especially in view of the fact that the said Act No. 248 goes into great detail in providing for the supervision, regulation, and control over aircraft carriers. It has been consistently held by the Supreme Court of Alabama that a statute dealing specifically with a subject will prevail over the general provisions of another statute, and, therefore, it is my opinion that, in view of the said Act No. 248, dealing specifically with the regulation and certification of air carriers, the general terms of the statutes conferring jurisdiction over the Public Service Commission cannot and do not extend to aircraft.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 10, 1943.

Hon. O. E. Cole, Chairman,
County Commission,
Russell County,
Phenix City, Alabama.

Code 1940, 12, § 4 — County Officers — Depositories of County Funds—

1. A county governing body, upon application of the county tax collector, treasurer, probate judge, clerk or register of the circuit court, is required to designate by resolution a bank or trust company wherein the applicant may deposit funds in his official hands.
2. Such designation continues effective until revoked or changed by the governing body.
3. The effect of such designation is to relieve the applicant and the sureties on his bond, from liability with respect to funds deposited by him in the depository, in case of insolvency of the depository.
4. It is optional with the officials mentioned to apply for appointment of a depository.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of October 28, 1943, is as follows:

"Sometime ago the County of Russell was examined by the Department of Examiners of Accounts, who notified this Commission that the Tax Collector, Probate Judge and Clerk of the Circuit Courts should each designate a Depository for the deposit of public funds.

"A few weeks ago other Examiners performing their duties in this County came to the conclusion that it was the duty of the County Commission to designate a Depository for all county officers.

"**QUARE:** Is it the duty of the County Commission of Russell County, Alabama to designate a Depository for the Tax Collector, Probate Judge and the Clerk of the Circuit Court for the depositing of their funds?

"2. Should the County designate a Depository each year?

"3. At what time should the County Commission each year or if they are (County Commission), required to designate a Depository act on such

matter?

"4. Should such designation of a depository be done by a Resolution of that body?

"Please render this County an official opinion on the above at your earliest convenience."

A county governing body, upon application of a county tax collector, treasurer, probate judge, clerk or register of the circuit court, is required by resolution to designate some bank or trust company "as a depository in which such officers may deposit moneys coming into their hands as such officers." Likewise, upon application of the county treasurer of school funds (or, I may add, the county custodian of school funds) a county board of education is required to appoint a bank or trust company as a depository wherein such officer may deposit money coming into his official hands.

In all cases where such depository is designated by the county governing body or the county board of education if funds so deposited are dissipated or lost by reason of insolvency or failure of the depository there shall be no liability on the part of the depositing officer, or the surety on his official bond. Code 1940, Title 12, Section 4.

Obviously this legislation (General Acts 1933, Ex. Ses., page 51, as amended by General Acts 1935, page 1119) was intended to place upon the county governing body and the county board of education responsibility for selection of a depository for the public officers named so as to relieve them and the sureties on their official bonds from liability if they complied with the statute in case liability arises from insolvency of the depository. There is nothing making it mandatory for any of these officers to apply for designation of a depository and it is entirely optional with them whether or not they shall seek to protect themselves and their sureties under the provisions of the statute.

It is to be noted that the county treasurer himself, in cases, of course, where there is a county treasurer, is entitled to the benefit of the statute.

This legislation, obviously induced by the bank failures of 1932 and 1933, is in no wise connected with the statutes (Title 12, Sections 30-42 and Title 12, Sections 43-53) providing for election of county treasurers in counties with a population of more than 56,000, and for selection by the county governing body on or before the first Monday in December each year in other counties, of an incorporated state or national bank in the county as a county depository of county funds for the next ensuing calendar year. Such depository functions as nearly as practicable as a county treasurer does in counties of the first class.

For answer, therefore, to your several inquiries, I am of opinion:

1. It is the duty of the County Commission of Russell County to designate a depository for the tax collector, probate judge, or clerk of the circuit court only upon application by those officers or some or any of them. In the

absence of such application no duty rests upon the commission to designate such depository.

2-3. When such depository is designated for any or all of such officers the designation will be in effect until thereafter revoked, or until a new designation, upon proper application, is made.

4. Whatever designation is made should, as required by the statute, be by resolution of the commission "spread upon its minutes."

As before indicated the selection of a county depository in lieu of a county treasurer to which the aforementioned officers shall pay over funds in their official hands upon proper accounting is an entirely different matter; and as I understand it no opinion is requested as to that.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 13, 1943.

Honorable Jas. T. Beeland,

Judge of Probate and Ex-Officio Chairman,

Butler County,

Greenville, Alabama.

Code 1940, Title 51, Section 835—License Inspectors—Stationery—

Counties not authorized to furnish license inspector letterheads, envelopes and second sheets for use in the discharge of his official duties.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of December 7, 1943, is as follows:

"Please give me your opinion on the following questions:

"1st. Is the Butler County Court of County Commissioners required to buy letterheads, envelopes and second sheets for the county license inspector? Under Code 1940, Title 51, Section 835, p. 1091, (h) 'It shall

be the duty of the court of county commissioners or other governing body of the several counties to supply the license inspector with necessary citation blanks and other necessary forms to be paid for by the county.' Also in Rep. Attorney-General, 1934-36, p. 455, 'Commissioner's court may pay for citations, citation letter blank, blank record book and indexing and rubber stamp for license inspector.' These references do not specifically include stationery such as letterheads, envelopes and second sheets and we would appreciate knowing your opinion on this matter.

"2nd. If the court of county commissioners is liable for the stationery of the county license inspector, how is the cost divided when he serves in more than one county? Is each court or other governing body liable according to the population of the county, assessed valuation of the county, or should the cost be divided equally among the county governing bodies?"

The office of license inspector as it now exists was created by Section 353 of the Revenue Act of 1935, General Acts 1935, page 559, (which now appears as Code 1940, Title 51, Section 835). His compensation except in counties where a salary is fixed by law is paid by citation fees and penalties assessed in cases of delinquency or of conviction in criminal cases. In addition to this the statute expressly requires the county governing body to supply him with "necessary citation blanks and other necessary forms."

The question is whether the words "other necessary forms" should be construed to include "letterheads, envelopes, and second sheets," presumably for his use in the course of correspondence in connection with the performance of his official duties.

In the opinion, to which you refer, to Hon. John S. Golson, Judge of Probate, Butler County, dated January 9, 1936, (Quarterly Report, Attorney General, Vol II, page 15) it was held that these words could be construed to include "citation letter blanks, blank record book and indexing and rubber stamp." On the other hand in an opinion dated November 4, 1935 to Hon. J. B. Tanner, License Inspector, Limestone County, (Quarterly Report, Attorney General, Vol. I, page 163) it was ruled that postage stamps used by the inspector in the course of correspondence did not come within the meaning of the quoted words.

It is well settled that public officers can look for compensation for their services only to the express terms of the statute creating the offices, regardless of the quantity or quality of their work.

It is also a well-known maxim of construction that the expression of one thing often excludes other things. I am of opinion, therefore, that there is no authority of law, whereby a county is required to furnish a license inspector stationery, such as letterheads, envelopes and second sheets, in addition to the "necessary citation blanks and necessary forms" above referred to.

I find nothing in this statute to indicate that the license inspector in the discharge of his official duties is expected or required to correspond with delinquents. On the contrary, he is required to make personal service of citations to delinquents and is not authorized to serve citations by registered letter, as was held under a similar statute in an opinion dated July 9, 1931,

to Hon. G. L. Malone, Judge of Probate, DeKalb County, Biennial Report
Attorney General, 1930-32, page 309.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 15, 1943.

Honorable G. H. Howard,

Probate Judge of Elmore County,

Wetumpka, Alabama.

Code 1940, Tit. 12, §§ 30, 39, 43, 52, 53,—County funds—Acting
County Treasurers—Compensation—

1. In counties with a population of 56,000 or less according to the 1930 Federal Census unless otherwise regulated by local act the county governing body is authorized to fix the compensation of an individual designated by it to act as treasurer in the event it is unable to designate a depository on satisfactory terms, without reference to the limitation fixed by law upon compensation of county treasurers in counties where such treasurers are elected.

2. In such cases the limitation of \$1,000 annually as compensation for elected county treasurers does not apply, and the county governing body is authorized to fix a reasonable compensation by contract with an individual acting in lieu of the depository.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of December 8, 1943, is as follows:

"Elmore County is a county of less than 56,000 population according to the 1930 Federal census. Therefore, according to Title 12 Section 43, Code of 1940, it is supposed to have a county depository in lieu of a County Treasurer. The Court of County Commissioners has been unable to designate a depository for county funds satisfactory to the said Court. Under authority of Title 12 Section 52, Code of Alabama of 1940, an individual has been designated to act as Treasurer at a stipulated salary.

"Title 12 Section 39, Code of 1940, provides for compensation of the County Treasurer and limits the aggregate sum to \$1,000.00 per year.

The money received and disbursed by the Treasurer of Elmore County, according to the percentage allowed by the Section just referred to, would justify a salary largely in excess of \$1,000.00 per annum. I note that this last Section, however, is in the article which provides for a County Treasurer in counties of more than 56,000 population. See Title 12, Section 30, Code of 1940.

"Title 12 Section 52 Code of 1940, does not place any limitation on the compensation to be paid the person acting as Treasurer, but does provide that an individual may be designated under such terms and conditions as may be fixed by the Court of County Commissioners.

"I would therefore like to have your opinion on the following:

"I. Does Title 12, Section 39, Code of 1940, limit the compensation to be paid to the person acting as Treasurer under Section 52 of Title 12 to \$1,000.00 per year?

"II. Or, has the Court of County Commissioners of Elmore County the power, if it so desires, to pay the Treasurer designated under Title 12 Section 52 a salary in excess of \$1,000.00 per annum?

"Please let me have your opinion on the above questions at the earliest possible moment."

Code 1940, Tit. 12, § 53 reads as follows:

"All acts required by law to be performed with respect to county funds other than the receipt and disbursement of county funds by the county depository shall be performed by the presiding officer of the board of revenue, or the presiding officer of the court of county commissioners or other like officer."

Said section is a revision of Code 1923, § 323, but upon comparison I find no difference between the two statutes except in the matter of verbiage. The revision was intended no doubt to clarify the uncertainty of the 1923 statute arising from the use of the words therein "all acts required by law to be performed by the county treasurer," by substituting the phrase "all acts required by law to be performed with respect to county funds."

Construing Code 1923, §§ 322, 323, now represented by Code 1940, Tit. 12, §§52, 53, the Supreme Court has said:

"There is no special magic or charm in the term 'County treasurer.' It was at one time a county office—a creature of the Legislature—in counties having a population of not more than fifty-five thousand, but that office has been abolished in such counties, and in lieu thereof the Legislature has conferred on the county boards authority to contract with banks as custodians of county funds. Such banks, when so contracted with, are not officers but a 'contractual agency.' ***

"It is not conceivable that the Legislature intended to abolish the

office of county treasurer and by the same enactment reincarnate the extinct office by another name. The object was more rational than such a conclusion would attribute to the lawmakers." *Covington County v. O'Neal*, 239 Ala. 322, 328, 195 So. 234 (1940).

The same reasoning applies with equal force to Code 1940, Tit. 12, §§ 52 and 53. If the county governing body is unable to find a satisfactory bank as depository within the limits of the county, it is authorized by § 52 "to designate some individual who may act as treasurer of such county under such terms and conditions as may be fixed ***." But it is equally inconceivable that by the use of such language the Legislature intended to re-create in such counties the office of "county treasurer,"—which it had expressly abolished.

This conclusion is emphasized in the succeeding section (§53) by the requirement that the "presiding officer" of the county governing body perform "all acts required by law to be performed with respect to county funds other than the receipt and disbursement of county funds by the county depository."

Clearly then the nominee or person designated under Section 52, whatever he may be called, upon failure of the governing body to find a satisfactory depository, stands in the shoes of the depository, as a substitute. He cannot claim the status of a county treasurer such as is elected for a term of four years under Tit. 12, § 30. His duties and activities are restricted by Section 53 to receipt and disbursement of county funds. As said in the *Covington County* case (p. 328):

"The Legislature did not stop with conferring power on the county board to procure a bank or banks as 'contractual agencies' but empowered the county board to select 'an emergency individual' under § 322 of the Code to 'act as treasurer,' and to 'fix the terms and conditions' on which he would be selected. ***

"And by *** § 323 of the Code, the Legislature itself fixed the duties of such "emergency individual" limiting his duties to receiving and paying out the county funds, and imposing all other duties in respect thereto under such emergency appointment on the "president of the board of revenue or court of county commissioners". ***

"Moreover, in counties falling within the influence of Article II, Chapter 17 of the Code, there is no such office as county treasurer, and the statute divides the duties and powers in respect to county funds—in the absence of a 'contractual agency,' between the individual acting, and the head of the county board ***."

I am of opinion therefore that the person, or "individual" designated pursuant to § 52, though described as "acting treasurer" is in reality a "contractual agent" rather than a county treasurer in the ancient and accepted meaning of that term.

Consequently his compensation is neither fixed nor limited by Tit. 12, § 39. Rather it is a matter of contract between him and the county, acting by and through the governing board. The board with its power to fix "terms and conditions" under which he may "act as treasurer" is vested with a discretion

in the matter of fixing his compensation which is one of the terms to be embraced in his contract of employment.

For answer to your questions, you are advised: (1) Code 1940, Tit. 12, § 39 does not limit the compensation to be paid to the person acting as Treasurer under Code 1940, Tit. 12, § 52, to \$1,000.00 per year; and (2) the governing body of Elmore County, subject to review in case of abuse of discretion, may contract under said § 52 to pay a person designated thereunder to "act as treasurer" compensation in excess of \$1,000 per annum.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 16, 1943.

Mrs. Edna N. Dunn,

Judge of Probate,

Conecuh County,

Evergreen, Alabama.

National Guard—Exemptions—Licenses—Motor Vehicles—Title 35,
Sections 13 and 101, Code of 1940.

Commissioned officers of the National Guard of Alabama, when ordered into the armed service of the United States, are still entitled to exemption from the State privilege tax and registration fee on automobiles.

Opinion by Assistant Attorney General Hawkins.

Dear Madam:

Your request for an official opinion, bearing date of November 30, 1943, is as follows:

"There seems to be so much misunderstanding about Officers in the National Guard Service being issued free automobile tags. I wrote you sometime ago about this matter. My answer was from Mr. Glenn E. Hill, Chief, saying 'no'. I would like to have a ruling on this as I have had two Officers who insist that they are entitled to free tags.

"Please let me hear from you in regard to this matter."

It is my opinion that commissioned officers of the Active National Guard

of Alabama who have been called, drafted, or ordered into the armed service of the United States are exempted from the privilege or license tax and registration fee levied on automobiles in this state.

Title 35, Section 101, Code of 1940, in pertinent part, provides as follows:

"There shall be exempted from the operation of the privilege or license tax and registration fee now or hereafter to be levied on automobiles and motor vehicles within the State of Alabama, passenger vehicles owned and operated by the Federal Government or by officers and enlisted men actually serving in the United States army who are assigned by the War Department as Instructors or Sergeant-Instructors with the National Guard of Alabama and all Commissioned officers of the Active National Guard of Alabama."

The question presented by you is the applicability of this exemption to commissioned officers of the National Guard of Alabama who have been called into the service of the United States. This question is directly answered by Title 35, Section 13, Code of Alabama 1940, which statute provides as follows:

"§ 13. Credit for service in the United States army.—Service in the national guard or naval militia of Alabama when called, drafted, or ordered into the service of the United States shall be considered as equivalent service in the Alabama national guard or naval militia for any and all state purposes regarding privileges, honors, pay, allowances, and exemptions provided by law for members of the national guard and naval militia of Alabama."

Therefore, commissioned officers of the Alabama National Guard, when called into the armed service of the United States, by virtue of Section 13, *supra*, are still entitled to their exemptions from the license tax and registration fee levied on automobiles in Alabama.

In an opinion of this office to Hon. Joe Patton, Tax Collector, Sumter County, under date of January 14, 1941, Quarterly Report Attorney General, Volume 22, page 24, a similar conclusion was reached regarding poll tax exemption.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

December 17, 1943.

Honorable Gordon Persons,
Associate Commissioner,
Alabama Public Service Commission,
Montgomery 1, Alabama.

Code 1940, Tit. 48, § 14—Alabama Motor Carrier Act of 1939—
Free Transportation—Public Service Commission—

Common carriers, whether by rail or motor vehicle, are authorized, but not required, to furnish free transportation to members, agents and employees of the Public Service Commission travelling on official business, but such members, agents and employees are not required to accept such transportation, and may pay therefor if they prefer.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of December 10, 1943, is as follows:

"Under past administrations it has been the practice of the Public Service Commission to request and subsequently use free passes from railroads and bus lines operating under the jurisdiction of the commission.

"Under Title 48, Section 14, of the 1940 Code, the language as applied to railroads is as follows:

"The following persons may, at the discretion of such carrier, pass free of charge on all railroads and all other common carriers and may, at the discretion of such carriers, receive free tickets, passes and transportation from such carriers."

"Following the above is a list of such persons which includes 'Members of the Public Service Commission and its agents and employees when traveling on official business may pass free of charge on all railroads and all other common carriers and may receive free tickets, passes and transportation from such carriers.'

"Under the Alabama Motor Carrier Act of 1939, Section 18, B-1, the following language is used in connection with the free pass situation, 'To members of the Commission and such of their employees as may be designated by them to assist the Commission in their duties under this Act and the members of the Commission and each of their employees as are designated by them to assist the Commission in the performance of their duties under the Act, shall be entitled to free transportation within the State upon any motor vehicle of any common carrier subject to the

provisions of this Act.'

"From the above two quotations you will note that apparently the railroads **may**, at their discretion, issue such passes, while the bus lines **must**.

"An investigation has disclosed that past Commissions have requested and obtained passes for persons other than its members and its employees and these passes have been used on other than official business for the Public Service Commission.

"Investigations have also disclosed that on numerous occasions, these passes have been used by the Commission's employees for other than 'official Business'.

"A large percentage of the complaints received by this Commission are from patrons of gas, electric, water and telephone companies. It has been the practice of the Commission's inspectors to use railroad and bus passes in following up such complaints.

"All the above is by way of explanation and without requesting an opinion from your office thereon, we did want an opinion as to this question; effective January 1, 1944, a majority of this Commission has decided not to request, nor accept, any free passes from any railroad or bus line for either members of the Commission or its employees. To the contrary, it is our desire that thereafter expenses incurred on official business, members of the Commission and its employees should pay for transportation and obtain a receipt therefor.

"The point involved is whether or not it is **mandatory** that members of the Commission and its staff use these free passes or whether this is simply permissive. If permissive, could we pay cash for transportation when on official business?

"A formal opinion from your office is requested."

Code 1923, § 5372, forbade common carriers of passengers to issue free transportation and made it a misdemeanor so to do, with numerous exceptions noted in the following section 5373. Among the exceptions were "members of the Public Service Commission when traveling on official business only."

Code 1923, § 9638, after authorizing the Commission to investigate the business of carriers, referred to therein as "all transportation companies," further provided that "the Commissioners in the performance of their duties may pass free of charge on all the railroads of the State and take with them free of charge any person in their official employment."

The Alabama Motor Carrier Act of 1931 (Gen. Acts, 1931, p. 303) in Section 49, on page 321, provides among other things: "The members of the Commission and such of their employees as may be designated by them to assist the Commission in the performance of their duties under this act shall

be entitled to free transportation within the State upon any vehicle of any motor transportation company coming under the jurisdiction of the Commission under this act," and further provides that such companies should not issue free transportation for passengers or property except, among others, " *** to members of the Commission and such of their employees as may be designated by them to assist the Commission in the performance of their duties under this act."

Code 1940, Title 48, § 14 is an obvious attempt to consolidate in a single section the foregoing statutory provisions of law, and after enumerating the various exceptions theretofore made by Code 1923, § 5373, *supra*, further provides in a separate sentence as follows: "Members of the Public Service Commission and its agents and employees when travelling on official business may pass free of charge on all the railroads and all other common carriers and may receive free tickets, passes and transportation from such carriers."

The last above-quoted sentence is preceded in said Section 14 by the words: "The following persons may, **at the discretion of the carrier**, pass free of charge on all railroads and all other common carriers, and may **at the discretion of such carrier** receive free tickets, passes and transportation from such carrier." (Emphasis added.)

It is to be noted that in the attempt to harmonize and unify then existing law as to free transportation whether by rail or motor vehicle for members, agents and employees of the Commission such transportation was restricted to travel on official business; whereas in the Motor Carrier Act of 1931 there was no such literal restriction and it might be contended possibly that such persons enjoyed the privilege whether travelling on official business or not. Such uncertainty, however, no longer exists.

By Act No. 669, H. 792, approved July 5, 1940, (after adoption on July 2, 1940 of the 1940 Code), General Acts 1939, page 1064, known as the Alabama Motor Carrier Act of 1939, it was provided, in Section 18 on pages 1079-1080, (B-1), that carriers subject to the act may not issue free transportation, except, among other things, "to members of the Commission and such of their employees as may be designated by them to assist the Commission in their duties under this act;" and further, that "the members of the Commission and such of their employees as are designated by them to assist the Commission in the performance of their duties under this act shall be entitled to free transportation within the State upon any motor vehicle of any common carrier subject to the provisions of this act."

Here again it is to be noted that there is no literal restriction upon such transportation and that the language quoted standing alone might be construed as authorizing free transportation without limitation to official business. It is necessary therefore to harmonize these various provisions of law, relating all of them to the same subject matter. The sum and substance of them all is that common carriers, whether by rail or motor vehicle, are authorized or permitted, if they see fit,—*"at their discretion"*—to furnish free transportation to the members, agents and employees of the Commission when travelling on official business. There is, however, no obligation or duty imposed upon the Commission or its members, agents, or employees to accept such transportation, just as there is no obligation on the carrier to furnish it.

Answering, therefore, your inquiry in the terms in which it is couched, I am of opinion that it is not "mandatory that members of the Commission and its staff use these free passes." Likewise, I am of opinion that members of the Commission and its staff may, if they prefer, pay for their transportation on official business.

This opinion is based upon the fact that the various provisions of law above quoted or referred to must be construed together in pari materia and in such wise as to avoid conflict or repugnancy. There is no basis for distinction between rail carriers and motor vehicle carriers in this respect. What applies to one with reference to free transportation should apply equally to the other, in order that we may have a consistent and workable system of law on the subject.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

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